4136

(4)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 337.

RACHEL S. GAFF, JOSEPH F. GENT, AND RICHARD THOMAS, PLAINTIFFS IN ERROR,

vs.

HENRY KIEFER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 13, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 337.

RACHEL S. GAFF, JOSEPH F. GENT, AND RICHARD THOMAS, PLAINTIFFS IN ERROR,

vs.

HENRY KIEFER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Transcript from State court	1	1
Summons	1	1
Complaint	2	1
Notice of appearance and demand	5	3
Answer	6	3
Amended complaint	9	4
Schedule A—List of customers	13	4
Petition for removal	15	6
Order for removal	18	7
Appearance for defendants	21	8
Rule on removal	21	8
Order for substitution of attorney	22	9
Consent for substitution of attorney	23	9
Trial	24	9
Verdict	26	10
Motion to set aside verdict	27	10
Notice of motion to set aside verdict	28	11
Affidavits in support of motion to set aside verdict	29	11
Affidavit of James H. Davis	29	11
James S. Caldwell	30	12
George Goldman	31	12
Order denying motion to set aside verdict, &c.	33	13

JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 23, 1888.

	Original.	Print.
Order reviving cause and directing judgment against surviving defendants	35	13
Order denying motion for new trial and vacating stay	37	14
Order allowing time to file bill of exceptions	40	14
Judgment	41	16
Bill of exceptions	44	17
Evidence for plaintiff	45	17
Testimony of Henry Kiefer	45	17
Frederick Licht	59	27
James Keim	70	36
Conrad Ament	72	37
Archibald Scott	83	45
Frederick Licht (recalled)	84	46
Edward M. Licht	85	47
John Abrahams	88	49
John Veidt	89	50
Thomas Fitzpatrick	89	50
Henry Kalp	91	51
Defendants' motion to dismiss denied	92	52
Evidence for defendants	92	52
Testimony of Richard Thomas	92	52
John D. Green	99	58
Dr. Anton Schwarz	106	63
Exhibit No. 1.—Letter of Dr. R. Ogden Doremus to Gaff, Gent and Thomas, March 29, 1882	116	71
Testimony of Dr. R. Ogden Doremus	119	72
Henry Elias	120	73
Max Schwarz	121	74
Edward C. Hazard	122	74
Henry Kiefer	122	75
Ira Edward Thurber	129	79
Anton Schwartz (recalled)	129	79
George Goldman	129	80
Henry Kiefer (recalled)	130	80
Wm. R. Pitcher	131	81
Wm. J. Pitcher (recalled)	134	84
Henry Kiefer (recalled)	136	85
John D. Green (recalled)	139	87
Wm. J. Hudson	141	88
Herman A. Schalk	142	89
Frank Newman	150	94
Richard Thomas (recalled)	152	95
Wm. J. Hudson (recalled)	153	97
Evidence for plaintiff in rebuttal	155	97
Testimony of Carl A. Holstein	155	97
John Abraham	157	99
Augustus Lundin	158	99
Carl A. Holstein (recalled)	159	100
Conrad Ament	159	100
Edward M. Licht	160	101
Mrs. Lizzie Ament	163	103
Charge to jury	163	103

	Original.	Print.
Defendant's requests and exceptions	165	104
Grounds for new trial	166	105
Copy of writ of error	168	106
Notice of appeal	170	106
Certificate to bill of exceptions	171	107
Consent to bill of exceptions	171	107
Notice of appeal	172	107
Bond	176	108
Clerk's certificate	177	109
Writ of error	178	109
Citation	181	110
Proof of service of citation	182	111
Joinder in error	183	111

1 New York Supreme Court.

HENRY KIEFER, Plaintiff,
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Composing the Firm of Gaff, Gent & Thomas, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated Brooklyn, August 6th, 1883.

M. L. TOWNS,
Plaintiff's Attorney.

Office and post-office address, No 16 Court street (rooms 39 to 42), Brooklyn, N. Y.

2 New York Supreme Court, Kings County.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Composing the Firm of Gaff, Gent & Thomas.

The complaint of the plaintiff respectfully shows—

First. That defendants are copartners doing business under the firm name of Gaff, Gent & Thomas, and carry on the manufacture and sale of corn, flour, meat, and cerealine.

Second. That plaintiff is a brewer carrying on the business of manufacturing and selling lager beer in the city of Brooklyn.

Third. That in the manufacture of said beer it is customary to use cerealine, and plaintiff has used the cerealine manufactured by defendants, which is manufactured from corn.

Fourth. That on or about the 30th day of January, 1883, plaintiff purchased from the defendants sixty bags (to wit, 5,400 pounds) of said cerealine, which plaintiff, to the knowledge of defendants, purchased to be used in and about the manufacture of lager beer.

3 Fifth. That the said cerealine was, to the knowledge of the defendants, entirely unfit to be used in the manufacture of lager beer, in that it was manufactured from damaged corn, and the use thereof in the manufacture of lager beer would destroy the value thereof and render the same deleterious and unsalable.

Sixth. That the defendants, though well aware of that fact and knowing that said cerealine would not only be of no value to the plaintiff

but would cause him great damage through the manufacture and sale of an inferior quality of beer, not only fraudulently and deceitfully withheld the knowledge thereof from the plaintiff, but sold the same for the full value of a good quality of cerealine and represented and stated the same to be a first-class article and equal to any that defendants had previously sold and in a fit condition for brewers' use; which representations were false and fraudulent, and the making thereof and the withholding of the knowledge as to the true character of said cerealine was with the intent to cheat and defraud the plaintiff in the sale of an inferior article for the price and value of a good article of cerealine.

Seventh. That plaintiff, believing that the said cerealine
4 was a good article, equal to that previously used by him, and fit for brewers' use, purchased the same as aforesaid and used it in the manufacture of lager beer.

Eighth. That by reason of the premises the beer manufactured by plaintiff in which said cerealine purchased from the defendants was used became damaged, unmerchantable, and ruined, whereby plaintiff lost his trade, was abandoned by his customers, some of whom are named in Schedule A, hereto annexed, which forms a part of this complaint, who refused to trade with plaintiff on account of the beer manufactured in which said cerealine was used being ruined by said damaged cerealine, plaintiff's business was impaired and ruined, and the property of the plaintiff has been injured and his estate lessened in the sum of thirty thousand dollars by reason of the premises.

Wherefore plaintiff demands judgment against defendants in the sum of thirty thousand dollars, besides the costs of this action.

M. L. TOWNS,
Pl'ff's Att'y.

Office and P. O. address, 16 Court street, Brooklyn, N. Y.

5 CITY OF BROOKLYN, } ss:
County of Kings, }

Henry Kiefer, being duly sworn, says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

HENRY KIEFER.

Sworn to before me this 6th day of August, 1883.

JAS. J. HUGHES,
Comm's. of Deeds, City of Brooklyn.

(Endorsed:) Summons and complaint. Affidavit. M. L. Towns, attorney for pl'ff.

Notice of Appearance and Demand.

Supreme Court, Kings Co.

HENRY KIEFER *against* THOMAS GAFF *et al.*

6 Please to take notice I am retained by and appear for all the defendants in this action, and demand that a copy of the complaint and all papers therein be served on me at my office, No. 154 Nassau street, N. Y. city.

Yours, &c., CHAS. S. SPENCER,
Attorney for Defendants.

Office address, 154 Nassau street; post-office address, Tribune building, N. Y. city.

To M. L. Towns, Esq., attorney for plaintiff.

Supreme Court of New York, Kings County.

HENRY KIEFER
ag'st
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS,
Comprising the Firm of Gaff, Gent & Thomas.

The defendants above named, answering the plaintiff's complaint, respectfully show:

First. They admit the allegations contained in the first and second sections or subdivisions of said complaint.

7 Second. They admit the allegations contained in the fourth subdivision of said complaint, except they have no knowledge or information as to the purposes for which the plaintiff bought the said cerealine therein alleged to have been bought *by* the defendants.

Third. The defendants deny each and every allegation contained in paragraphs or subdivisions fifth, sixth, and ninth of said complaint.

Fourth. The defendants have no knowledge or information sufficient to enable them to form a belief as to the allegations contained in section or paragraph seven of said complaint.

Fifth. The defendants deny each and every allegation in said complaint contained not hereinbefore admitted, denied, or otherwise qualified or explained.

Sixth. The defendants, further answering said complaint, allege that the damage to said plaintiff's lager beer, if any, was occasioned wholly and solely by the negligence and carelessness of the plaintiff and his agents, and was not occasioned by any act of the defendants, as alleged in plaintiff's complaint.

Wherefore the defendants demand judgment that the complaint of the plaintiff be dismissed with costs.

8 CHAS. S. SPENCER,
Defendants' Attorney, 154 Nassau Street,
Tribune Building, New York.

CITY AND COUNTY OF NEW YORK, *ss.:*

Oscar O. Bennett, being duly sworn, deposes and says that he is the general agent of the business of the defendants in the city of New York, resident at the city of New York, and therefore familiar with the matters involved in this action, and that he knows the contents of the foregoing answer and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

OSCAR OLIN BENNETT.

Sworn to before me 5th day of November, 1883.

JOHN HAHNENFELD,
Notary Public, New York County.

9 New York Supreme Court, Kings County.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS,
Composing the Firm of Gaff, Gent & Thomas.

The amended complaint of the plaintiff respectfully shows—

First. That the defendants are copartners doing business under the firm name of Gaff, Gent & Thomas, and carry on the manufacture and sale of corn, flour, and cerealine.

Second. The plaintiff is a brewer carrying on the business of manufacturing and selling lager beer in the city of Brooklyn.

Third. That in the manufacture of said lager beer it is customary to use cerealine, and plaintiff has used the cerealine manufactured by defendants, which is manufactured from corn.

Fourth. That from on or — April 4th, 1883, up to and
10 including July 3, 1883, at divers times the plaintiff purchased from the defendants a large quantity of cerealine, which the plaintiff, to the knowledge of the defendants, purchased to be used in and about the manufacture of lager beer.

Fifth. That the greater part of said cerealine was, to the knowledge of the defendants, entirely unfit to be used in the manufacture of lager beer, in that it was manufactured from damaged corn, and the use thereof in the manufacture of lager beer would destroy the value thereof and render the same deleterious and unsalable.

Sixth. That the defendants, though well aware of that fact and knowing that said cerealine would not only be of no value to the plaintiff but would cause him great damage through the manufacture and sale of an inferior quality of beer, not only fraudulently and deceitfully withheld the knowledge thereof from the plaintiff, but sold the same for the full value of good quality of cerealine and represented and stated the same to be a first-class article and equal to any that defendants had previously sold and in a fit condition for brewers' use; which representations were false and fraudulent, *in*

the making thereof and the withholding of the knowledge as
11 to the true character of said cerealine was with intent to cheat and defraud the plaintiff in the sale of an inferior article for the price and value of a good article of cerealine.

Seventh. This plaintiff, believing that the said cerealine was a good article, equal to that previously used by him and fit for brewers' use, purchased the same as aforesaid and used it in the manufacture of lager beer.

Eighth. That the plaintiff paid said defendants for the greater portion of said damaged cerealine upon said representation the sum of two thousand and fifty-nine seventy one-hundredths dollars, to which amount plaintiff is especially damaged.

Ninth. That by reason of the premises the beer manufactured by the plaintiff in which said cerealine purchased of the defendants was used became damaged and unmerchantable and ruined, whereby plaintiff lost his trade, was abandoned by his customers, some of whom are named in Schedule A, hereto annexed, which forms a part of this complaint, who refuse to trade with plaintiff on account of the beer manufactured in which said cerealine was used being ruined by said damaged cerealine, plaintiff's business was im-
12 paired and injured, and the property of the plaintiff has been injured and his estate lessened in the sum of thirty thousand dollars by reason of the premises.

Wherefore the plaintiff demands judgment against the defendant in the sum of thirty-two thousand dollars, besides the costs of this action.

M. L. TOWNS,
Plaintiff's Attorney.

Office and post-office address, No. 16 Court street, Brooklyn.

CITY OF BROOKLYN, } ss:
County of Kings, }

Henry Kiefer, being duly sworn, says that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY KIEFER.

Sworn to before me this 17th day of October, 1883.
JAS. J. HUGHES,
Com'r of Deeds, City of Brooklyn.

13 SCHEDULE A. Referred to in Foregoing Complaint.

Peter Becker, Flushing & Throop avenue, Brooklyn, E. D.
James F. Mooney, 15th Str. & Fifth avenue, South Brooklyn.
Jacob Bouhag, 27 Columbia street, New York.
Aug. Spennecke, 4 Bleeker street, do.

Georg. Romig, 171 Essex street, New York.
C. H. Fallet, 141 E. 8th street, do.
L. Weil, 269 E. Houston street, do.
H. W. Brummer, 237 E. 26th street, do.
A. Cotteler, 185 Rivington street, do.
M. Weickert, 473 E. Houston street, do.
J. J. Czessull, 620 E. 17th street, do.
Louis Müller, 204 E. 7th street, do.
Jos. Sternkopt, 34 Varet street, Brooklyn, E. D.
Wm. Droll, 231 Marcy avenue, do.
Chas. Bernhard, 64 Smith Str., do.
Emil Keller, 356 Broome street, New York.
A. Wolf, 187 Avenue B, do.
L. Krause, 602 Grand street, do.
J. F. Seeger, 124 Attorney street, do.
Leo. Kemmerer, 214 E. 4th Str., do.
Ad. Bergar, 205 Scholes street, Brooklyn, E. D.
14 Jos. Ald, 251 Rockaway avenue, Brownsville.
Fr. Denig, 438 North 2nd Str., Brooklyn, E. D.
H. Wittich, 276 Franklin street, "
Frank Bahlbender, 467 Grand street, Brooklyn, E. D.

15 New York Supreme Court, Kings County.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS.

To the supreme court of New York:

The petition of Richard Thomas respectfully shows to the court—

I. That an action has been brought in this court against your petitioner, Richard Thomas, together with the other defendants in this action above named by the above-named plaintiff.

II. That this said action is brought by said plaintiff to recover thirty-two thousand dollars for an alleged damage which said plaintiff claims to have sustained because of an alleged sale to said plaintiff of certain damaged and unsound cerealine to be used by plaintiff in the manufacture of lager beer, which said cerealine plaintiff alleges defendants falsely and fraudulently represented to
16 be sound and of good quality.

III. That the plaintiff is a resident of this State, and your petitioner and all the codefendants herein are non-residents of this State and reside, respectfully, as follows:

Thomas Gaff, at Aurora, Indiana; R. S. Gaff, at Cincinnati, Ohio; Joseph F. Gent, at Columbus, Indiana; Richard Thomas, at Columbus, Indiana, of which said places the defendants are, of your petitioner's own knowledge, actual residents and citizens.

IV. That the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, as appears by the summons and complaint.

V. That your petitioner now does, as well for himself as for the other defendants herein, enter their appearance in this action, no appearance having been entered heretofore.

VI. That he hereby offers good and sufficient security for his entering in the next circuit court of the eastern district of New York, on the first day of its session, copies of the process against said defendants in this action, and also for their then appearing and entering special bail in this action, if special bail were originally requisite therein, according to the law and practice of
17 the United States and its courts.

Your petitioner therefore asks that the said cause may be removed for trial into the next circuit court to be held in the district where the same is pending, to wit, into the next circuit court for the eastern district of New York, pursuant to the provisions of the said statutes of the United States in such cases made and provided, and that this court do accept the securities offered by your petitioner as aforesaid, and do proceed no further in said cause, and for such other order or relief as in the premises may to the court seem equitable and just.

Dated N. Y., March 19, 1884.

RICHARD THOMAS, *Petitioner.*

CITY AND COUNTY OF NEW YORK, *ss:*

Richard Thomas, being duly sworn, says that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

RICHARD THOMAS.

Sworn to before me March 18, 1884.

JOHN HAHNENFELD,
Notary Public, N. Y. County.

18 At a special term of the supreme court of the State of New York in and for the county of Kings, held — the court-house, in the city of Brooklyn, on the 21st day of April, 1884.

Present: The Honorable Calvin E. Pratt, justice.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS.

On reading and filing the petition and affidavit of Richard Thomas, one of the defendants herein, dated March 19th, 1884, and praying for the removal of this action into the circuit court of the United States for the eastern district of New York, pursuant to the statutes of the United States in such cases made and provided, and upon the undertaking herein duly executed and approved by one
19 of the justices of this court, and upon the pleadings herein, whereby it appears that the said action is of a civil nature

and is now pending in this court—place of trial, county of Kings—and that the matter in dispute exceeds the sum of five thousand dollars, exclusive of costs, and involves a controversy between citizens of the State of New York and the States of Ohio and Indiana, and that the defendants have duly offered a proper undertaking or bond, with good and sufficient sureties, for the filing of all process against themselves in this action in said circuit court, and the said affidavit showing that the removal of the cause is desired because the defendants have reason to believe and do believe that by reason of local predjudice and influence defendants will not be able to obtain justice in the local courts, now, on motion of Charles S. Spencer, defendants' attorney, it is ordered that said petition be, and the same hereby is, granted and the said undertaking duly accepted by this court, and that the said action be, and the same hereby is, removed to the circuit court of the United States for the eastern district of New York, and that this court proceed no farther herein.

C. E. P., *J. S. C.*

Granted Apl. 21, 1884.

RODNEY THURSBY, *Clerk.*

20 (Endorsed:) U. S. circuit court, eastern district of New York. Record on removal from New York supreme court, Kings county, Henry Kiefer, plaintiff, against Thomas Gaff *et al.*, defendants. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 13th day of May, 1884.

21 *Appearance. Entered May 13th*, 1884.

U. S. Circuit Court, Eastern District of New York.

HENRY KIEFER
ag'st
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS,
Composing the Firm of Gaff, Gent & Thomas.

The appearance of Charles S. Spencer as solicitor for the defendants, Thomas Gaff *et al.*, in the above-entitled action is hereby entered.

Rule.

This cause having originally been commenced in the supreme court of the State of New York in and for Kings county, and having been duly, by order of one of the justices of said State court, removed into the circuit court of the United States of the eastern district of New York upon the application of the above-named defendants, and said defendants having this day duly filed a copy of the record in this cause, and having duly appeared, now, on
22 motion — Charles S. Spencer, solicitor for said defendants, and upon the appearance and record herein, it is ordered that this cause do proceed in this court in the same manner as if had been originally brought herein.

At a stated term of the circuit court of the United States for the eastern district of New York, held at the court-house, in the city of Brooklyn, on the 21st day of August, 1884.

Present: Hon. Chas. L. Benedict, district judge, holding court.

HENRY KIEFER *ag'st* THOMAS GAFF and Others.

Upon reading and filing the annexed consent it is ordered that C. W. Moulton be, and hereby is, substituted as attorney for the defendants in this action in the place and stead of Charles A. Spencer.

CHAS. L. BENEDICT.

23 United States Circuit Court, Eastern District of New York.

HENRY KIEFFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS.

It is hereby consented that C. W. Moulton be substituted in my name and place as attorney for the defendants in this action.

New York, April 21, 1884.

CHARLES A. SPENCER,
Def'ts' Att'y, 154 Nassau —, Tribune Building, New York City.

(Endorsed:) Consent and order substituting attorney. C. W. Moulton, attorney for defendants. Filed in the office of the
24 clerk of the U. S. circuit court for the eastern district of New York, this 21st day of August, 1884.

At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 9th day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

HENRY KIEFER *vs.* RACHEL GAFF *et al.*

Cause called.
Hearing ordered.
Jury drawn and sworn.
Appearances: M. L. Towns, attorney, and B. F. Tracy, of
25 counsel, for plaintiff; Geo. R. Phoebus and Chas. W. Moulton, attorneys for defendants.
Evidence for plaintiff offered.
Trial suspended to October 12, 1885.

OCTOBER 12, 1885.

Trial resumed. Same appearances.
Evidence for plaintiff resumed.
Plaintiff rests.
Evidence for defendants offered.
Trial suspended to October 13, 1885.

OCTOBER 13, 1885.

Trial resumed. Same appearances.
Evidence for defendants resumed.
Trial suspended to October 14, 1885.

OCTOBER 14, 1885.

Trial resumed. Same appearances.
Evidence for defendants resumed.
Trial suspended to October 15, 1885.

OCTOBER 15, 1885.

26 Trial resumed. Same appearances.
Evidence for defendants resumed.
Defendants rest.
Evidence offered by plaintiff in rebuttal.
Plaintiff rests.
Cause argued before jury.
Jury charged.
Request to charge made by both sides.
Jury retire, with request to bring in sealed verdict.

OCTOBER 16, 1885.

Jury came into court with sealed verdict; verdict opened and recorded as follows:

"We, the jurors empanelled in the above-entitled cause, do find in favor of the plaintiff and against the defendants, and assess the damages of the plaintiff in the sum of eighty-five hundred and twenty-two dollars; and so say we all."

Motion for stay of proceedings, with leave to move for new trial granted.

A true extract from the minutes of this court.

B. LINCOLN BENEDICT, *Clerk.*

27 *Motion to set Aside Verdict.*

United States Circuit Court for the Eastern District of New York.

HENRY KIEFER, Plaintiff,

vs.

THOMAS GAFF, R. S. GAFF, JOSEPH GENT, and RICHARD THOMAS.

Now come the defendants, Rachel S. Gaff, Joseph F. Gent, Richard Thomas, and Charles L. Howe and Elam H. Davis, executors of the last will and testament of Thomas Gaff, one of the above-named defendants, deceased, by C. W. Moulton, George R. Phoebus, and Miron Winslow, their counsel, and move the court to set aside the verdict in the above-entitled action in favor of the plaintiff and against the above-named defendants on the — day of October, 1885, on the ground that Thomas Gaff, one of the above-named defendants, was dead at the time said verdict was rendered; that he died on the 25th day of April, 1884, and that there has been no renewal

of said action against his executors, and that no suggestion was made on the record prior to the entry of said verdict.

28 Wherefore the defendants claim said action is abated.

Dated New York, November 2nd, 1885.

GEO. W. PHOEBUS,
C. W. MOULTON,
Attorneys for Defendants and Executors.

MIRON WINSLOW, *Of Counsel.*

United States Circuit Court for the Eastern District of New York.

HENRY KIEFER, Plaintiff,
ag'st
THOMAS GAFF, RACHEL S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS.

SIR: Please take notice on the affidavit of Richard Thomas, a copy of which was served on you on the 21st day of October, 1885, and on the affidavits of James H. Davis, James E. Caldwell, and George Goldman, copies of which are herewith served on you, the motion hereto annexed will be made to this court at a stated term

29 thereof, to be held at the United States court-house, in the city of Brooklyn, county of Kings and State of New York, on Thursday, the fifth day of November, 1885, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, to set aside the verdict for the plaintiff herein on the grounds set forth in said motion.

C. W. MOULTON,
GEORGE R. PHOEBUS,
Att'ys for Defendants, 154 *Nassau Street, New York City.*

MIRON WINSLOW, *Of Counsel.*

STATE OF OHIO, }
County of Hamilton, } *ss:*

James H. Davis, being duly sworn, says that he now is, and for the last past thirty-two years has been, assistant undertaker with John F. Wiltsee, undertaker, Nos. 293 and 295 West Sixth street, Cincinnati, Ohio. Affiant says that he personally knew the deceased, Thomas Gaff, of Aurora, Indiana; that he was, on the 25th day of April, 1884, called upon to dress and embalm the body of the said Thomas Gaff, and did so dress and embalm the same, the body

30 being brought to this establishment, Nos. 292 and 295 West Sixth street, Cincinnati, Ohio, for that purpose; that after dressing and embalming said body the same was shipped from this establishment on April 27th, 1884, to Aurora, Indiana, and that the same was returned to this city and interred at Spring Grove cemetery.

JAMES H. DAVIS.

Sworn to and subscribed before me by said James H. Davis this 23rd day of October, 1885.

WILLIAM H. JONES,
Notary Public, Hamilton Co., Ohio.

COUNTY OF HAMILTON, *ss:*

James S. Caldwell, being duly sworn, says that he is a practicing physician, having his office at No. 192 West Seventh street, Cincinnati, Ohio. Affiant says that on April 25th, 1884, he was called on to see Thomas Gaff, of Aurora, Indiana, said Gaff being on that date in Cincinnati; that he did call on him on said date and found him dead, the body being still warm at the time he called on him, said Gaff having died about ten or fifteen minutes before affiant reached the house where said Gaff was and where he had died.

31 J. S. CALDWELL, M. D.

Sworn to and subscribed before me by said J. S. Caldwell this 23rd day of October, 1885.

WILLIAM H. JONES,
Notary Public, Hamilton Co., Ohio.

Affidavit.

CITY AND COUNTY OF NEW YORK, *ss:*

Circuit Court of the United States, Eastern District of New York.

HENRY KIEFER, Plaintiff,
vs.
THOMAS GAFF, RACHEL S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Defendants.

George Goldman, being duly sworn, deposes and says that he is over twenty-one years of age; that he is at present in the employ of the firm of Gaff, Gent & Thomas, of Columbia, Indiana, and New York city; that he is the confidential agent of said firm in New
32 York and knows each member of said firm; that he was in the employ of said firm at the time of the death of Thomas Gaff, one of the defendants in this action, on the 25th day of April, 1884; that he has read the affidavits of James H. Davis and J. S. Caldwell, which are hereto annexed, relating to the death of said Thomas Gaff, and that he knows the Thomas Gaff therein mentioned is the identical Thomas Gaff who was in his lifetime a member of said firm of Gaff, Gent & Thomas, and who is one of the defendants mentioned in the above-entitled action.

GEO. GOLDMAN.

Sworn to before me this 2nd day of November, 1885.

MIRON WINSLOW,
Notary Public, New York County.

(Endorsed:) Copy affidavits & notice of motion to set aside verdict. C. W. Moulton, Geo. R. Phoebus, attorneys for defendants.

33 At a stated term of the United States circuit court for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Present: Hon. Charles L. Benedict, district judge, holding court.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH GENT, and RICHARD THOMAS.

A motion having been made herein by C. W. Moulton and George R. Phoebus, attorneys for defendants, in behalf of Rachel S. Gaff, Joseph F. Gent, Richard Thomas, defendants, and Charles L. Howe and Elam H. Davis, executors of the last will and testament
34 of Thomas Gaff, one of the above-named defendants, deceased, to set aside the verdict in the above-entitled action in favor of the plaintiff and against the above defendants, upon the ground that Thomas Gaff, one of the above defendants, was dead at the time the verdict was rendered, and that he died upon the 25th day of April, 1884, and that there has been no renewal of said action against the executors, and that no suggestion was made on the record prior to the entry of said verdict, and to have the court declare said action abated for said reasons set forth;

And said motion having duly come on for a hearing before this court at a stated term thereof, held at the United States court-house, in the city of Brooklyn, county of Kings and State of New York, on Thursday, the fifth day of November, 1885, at 10 o'clock in the forenoon of that day:

Now, after hearing Messrs. C. W. Moulton and George R. Phoebus in favor of said motion and M. L. Towns in opposition thereof—

It is ordered that said motion be, and the same hereby is, denied in each and every respect.

And it is further ordered that the death of the said Thomas Gaff, one of the defendants herein, be declared and suggested upon the record herein.

35 And it is further ordered that the plaintiff have costs of this motion.

CHAS. L. BENEDICT.

(Endorsed:) Order denying motion to set aside verdict. M. L. Towns, attorney for pl'ff. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 24th day of February, 1886.

At a stated term of the United States circuit court for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 24th day of Feb-

ruary, in the year of our Lord one thousand eight hundred and eighty-six.

Present: Hon. Charles L. Benedict, district judge, holding court.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH GENT, and RICHARD THOMAS.

It appearing to the satisfaction of this court by the affidavits
36 of James H. Davis, residing at 293 & 295 West Sixth street, Cincinnati, and the affidavit of James S. Colwell, residing at 192 West Seventh street, Cincinnati, both dated October 23rd, 1885, and the affidavit of George Goldman, dated the 2nd day of November, 1885, that Thomas Gaff, one of the codefendants in this action, died after the commencement of this action and before verdict herein had been entered, to wit, on or about the 25th day of April, 1884, and this action being against several codefendants, and the cause of action being a cause of action that survives against the other defendants as provided by law, it is hereby ordered, upon motion of M. L. Towns, attorney for plaintiff, that said cause of action survive and proceed against the defendants, R. S. Gaff, Joseph Gent, and Richard Thomas, the surviving codefendants, and that the death of Thomas Gaff, the other codefendant herein, be suggested, and hereby is suggested, upon the record of this action.

I hereby direct that judgment given herein against the defendants be entered against the surviving codefendants, R. S. Gaff, Joseph Gent, and Richard Thomas, in accordance with this order; to all of which defendants except.

CHAS. L. BENEDICT.

(Endorsed:) Order denying motion to set aside verdict and directing judgment to be entered against surviving codefendants.
37 M. L. Towns, pl'ff's attorney. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 24th day of February, 1886.

At a stated term of the United States circuit court for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the 24th day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Present: Hon. Charles L. Benedict, district judge, holding court.

HENRY KIEFER
against
THOMAS GAFF, R. S. GAFF, JOSEPH GENT, and RICHARD THOMAS.

A motion having been made, on behalf of the defendants, by C. W. Moulton and George R. Phoebus for a new trial on the minutes of this action, upon the grounds—

That the verdict rendered herein was contrary to the evidence;

That said verdict is against the weight of evidence;

That said verdict is contrary to law;

38 That the court committed manifest error in refusing to admit evidence offered by the defendants that should have been admitted, to which defendants duly excepted at the time;

That the court committed manifest error in admitting evidence offered against the defendants, to which the defendants duly objected and excepted at the time;

That the court committed manifest error in refusing to dismiss the plaintiff's complaint at the close of the plaintiff's testimony, to which defendants duly excepted at the time;

That the court committed manifest error in charging the jury, on the pleadings in this case, that the defendants were liable for the fraud of their agent, committed without their knowledge or consent, to which the defendants duly excepted at the time;

That the court erred in charging the jury as to the rule of damages governing this action, and for other manifest errors in said proceedings—

And said motion having been duly before this court for argument on the 28th day of December, 1885:

Now, after hearing C. W. Moulton in favor of said motion and M. L. Towns and B. F. Tracy, of counsel for plain-

39 tiff, in opposition thereto—

It is ordered that said motion be, and the same hereby is, denied upon each and every ground taken in every respect.

And it is further ordered that the stay heretofore granted the defendants prohibiting the plaintiff from entering his judgment against the defendants be, and the same hereby is, vacated and set aside, and the plaintiff is hereby permitted to properly enter up his judgment and proceed thereupon according to law and practice of this court and against the surviving codefendants in this action.

To all of which said defendants except and pray an appeal in open court to the Supreme Court of the United States, which is allowed.

CHAS. L. BENEDICT.

(Endorsed:) Order denying motion for a new trial and vacating stay. M. L. Towns, attorney for pl'ff. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 24 day of February, 1886.

40 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial circuit, held at the United States court-rooms, in the city of Brooklyn, on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

Present: The Honorable Charles L. Benedict, district judge, holding the court.

HENRY KIEFER, Plaintiff, *vs.* THOMAS GAFF *et al.*, Defendants.

The order denying the defendants' motion for a new trial herein having been granted by the court on the twenty-fourth day of Feb-

ruary, 1886, and permitting him to enter his judgment herein, and the defendants intending to appeal from the judgment herein to the Supreme Court of the United States, and said appeal having been allowed on motion of C. W. Moulton, defendants' attorney, it is

Ordered, That the defendants have thirty days from the
41 entry of judgment herein in which to prepare and file bill of exceptions.

CHAS. L. BENEDICT.

(Endorsed:) Order. C. W. Moulton, Geo. R. Phoebus, att'ys for defendants. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 24th day of February, 1886.

Judgment. February 26, 1886.

United States Circuit Court, Eastern District of New York.

HENRY KIEFER
ag'st
THOMAS GAFF, RACHEL S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS.

42 The above-entitled action having been tried before the Hon. Charles L. Benedict, one of the judges of this court, and a jury at the October term of this court, 1885, and a verdict having been rendered in favor of the plaintiff against the defendants for eight thousand five hundred and twenty-two dollars ($8,522), and the defendants having made a motion for a new trial on the exceptions taken on the trial, and the said motion having been entertained and argued by C. W. Moulton, Esq., attorney for the defendants, and M. L. Towns, Esq., attorney for the plaintiff, and B. F. Tracy, Esq., of counsel, and due deliberation having been had, and the court after due consideration having overruled and denied said motion and directed judgment to be entered on said verdict, and a further motion having been made to set aside the verdict as to Thomas Gaff (deceased), one of the defendants, and an order having been entered denying the same and directing that the fact of the death of defendant, Thomas Gaff, be declared and suggested on the record herein:

Now, on motion of M. L. Towns, Esq., attorney for plaintiff, it is adjudged, considered, and determined that said plaintiff, Henry Kiefer, do have and recover judgment against said defendants,

Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, the
43 surviving codefendants in this action, for the amount of said verdict, eight thousand five hundred and twenty-two dollars ($8,522) and $168.65 costs and disbursements in this action, as taxed.

It is ordered that said plaintiff have execution against said surviving codefendants for the amount of the verdict herein.

By order of court:

B. LINCOLN BENEDICT, *Clerk.*

Dated February 26, 1886.

(Endorsed:) Judgment-roll.	Amount of verdict-----	$8,522 00
	" " costs-------	168 65
		$8,690 65

Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 26 day of February, 1886.

44 *Bill of Exceptions.*

United States Circuit Court, Eastern District of New York, in the Second Circuit.

HENRY KIEFER, Plaintiff,
against
THOMAS GAFF, R. S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Composing the Firm of Gaff, Gent and Thomas, Defendants.

This action was commenced on the 6th day of August, 1883, in the New York supreme court, Kings county, by the service of summons and complaint. The defendants appeared and answered the complaint, and then the cause was removed into the circuit court of the United States for the eastern district of New York, on the 13th day of May, 1884. The issues came on for trial at a term of the circuit court held by the Honorable Charles L. Benedict, one of the judges of said court, on October 9th, 1885. A jury was duly impanelled and sworn, and thereupon the plaintiff opened the case to the jury, and there, to maintain the issues upon his
45 part, called as a witness Henry Kiefer, the plaintiff, who, being duly sworn and examined, testified as follows:

In am the plaintiff in this action and am engaged in business at Nos. 136 and 142 Scholes street—the business of brewing lager beer. I was in such business in 1882 and 1883. I know Mr. Thomas, of the firm of Gaff, Gent & Thomas, and I have had dealings with said firm. At the time I first commenced I bought from Benjamin Marshall in 1882; I bought of him first. He was not the manager of Gaff, Gent & Thomas; he was an agent. The manager for Gaff, Gent & Thomas was O. O. Bennett, and he was the manager in 1883. I first commenced purchasing cerealine from the defendants in the spring of 1882, I think. I purchased it for brewing lager. I told the defendants that I purchased it for brewing lager. I saw Mr. Bennett himself. Cerealine had been on the market for some time. Mr. Marshall came to me and offered the goods, and I told him that I wanted to see the firm themselves, and he said that none of the firm had been in New York, but he would send over O. O. Bennett. He was the manager of Gaff, Gent & Thomas. I saw O. O. Bennett then. I have the bills here to show. In my conversation with Mr. Bennett I told him that lager beer was a very peculiar article, and that we had to have nothing but first-class goods. He guaranteed me. I told him I didn't want anything but the very best; I didn't mind the price; that I wanted the very best, and also I wanted his guarantee, and

he guaranteed the goods. This was the time when this product was new, in 1882. He stated this product would supply the place of malt in the brewing of lager beer—mixed it with malt. He said it would have a good effect on the beer, and so it did have for a year and a half. It had first-class effect. It made a better class of beer; a little duller than the usual color is of malt; in fact, I was very well suited. It gives the beer an amber look; it assists in fermentation. I continued to purchase of these defendants, through O. O. Bennett, up to July 3d, 1883; that was the last we got. On the 3d of July my foreman called me—came into the office—and brought in a lump of the cerealine, and says: "Now, boss, I have found out what the difficulty——" (Interrupted here by his counsel and
46 told to state just what he saw.) I saw this cerealine. Before this, in the latter part of May or June, I had a conversation with Mr. Bennett. In the fore part of June, 1883, we detected that our beer wasn't right. I sent for Mr. O. O. Bennett; at first I had a talk with my foreman; he wanted to know where the blame laid; he couldn't see, and then I sent for Mr. O. O. Bennett. I says, "Mr. Bennett, just taste this beer." I says, "Don't you think that this probably lies in the cerealine?" He says, "No." I says, "We had such good effects right straight along for a year and a half, and we continued brewing in the same way, and this beer isn't palatable; it don't taste like it ought to, and hasn't got any gloss." I told him that I had trouble with my customers. He says, "You have been buying of us right along, and we told you we guaranteed our goods;" and I says, "I am paying a high price for my goods." I always paid the highest market price; and I says, "There seems to be something wrong." He says, "You can go ahead; by my word of honor you will get first-class goods. I will guarantee the goods." When I told him I was using the defendants' article he said he wouldn't have it; it was not the cerealine that spoiled the beer. He said the goods he was selling then was the same quality as those he had already sold. I said that I was having a regular uproar in business; that my customers were finding fault; the beer was not fine—he could see for himself—and he said he positively told me it wasn't the cerealine. He told me to go on and use it. I afterwards purchased from him during the month of June and till the 3d day of July I got the last. I brewed from May 1st till May 31st 2,445 barrels and sold 2,199. From June 1st till June 30th I brewed 2,395 barrels. I don't mean that I brewed that much, but it wasn't drinkable; that wouldn't naturally become drinkable for six weeks or so. I made these 2,395 barrels by using this cerealine—this cerealine that I bought from O. O. Bennett. (Witness produces bill of the cerealine Mr. Bennett sent him.) The beer that I brewed in June, after this conversation with Bennett, I mixed with the old beer. Beer that lays six or eight weeks gets kind of stale; there is no life to it. Then we work it up with what we call livening-up beer. After the beer is brewed we give it yeast, and in about twenty-four hours or in sixty hours or maybe seventy hours that beer comes on, and we ferment with the newly-brewed beer. Then we
47 take, say, about forty barrels, and we take about seven barrels

of this new beer to work up the old. That beer works till it works itself clear, so that in about two weeks thereafter it is fit for sale. This is a common practice; cannot do no other way. By putting that new beer with the old it gave better lager. As soon as we detected, about the fore part of June, we found our beer wasn't as fine as it used to be by a good deal.

Q. Did you get any beer back?

A. O, God, yes; we got back close on to 300 barrels. What I mean by barrels is 4 quarters to a barrel. There are four kegs to a barrel. Well, we traced that beer back when we found out——

Q. How do you know that these 1,200 kegs returned was that beer? How do you designate it? Was that the beer that was mixed with beer that was brewed in June?

(Counsel for defendants objects to the form of this question. Objection overruled; to which ruling counsel for defendants excepts.)

A. It was beer that was livened up about the 1st of June with new beer. The beer that was sent back to me I had to let run into the sewer. It was destroyed. The market price of beer during the year of 1883 was $8.00 a barrel. I saw this cerealine that I bought before it was put into the beer. When I saw it, by the look you couldn't tell the difference. You couldn't tell the difference till after we got into trouble. By the looks you couldn't tell, or we wouldn't have used it under no circumstances. Using an impure article for a month would ruin our business entirely. The $8.00 a barrel that beer was worth in 1883 included $1.00 revenue stamp. We had to put the revenue stamp on the beer we sent out to our customers. I sold that beer for $8.00 a barrel, including the $1.00 revenue stamp. There was no money paid for the beer that was returned.

Counsel for defendants moves to have all this testimony go in subject to objection and exception.

48 (Motion granted. All evidence of the quality and quantity of beer spoiled went in subject to exception.)

Q. Was there any more of this beer brewed during the month of June destroyed?

A. Yes, sir; it was let run in the sewer; 1,580 barrels were allowed to run in the sewer; the men ran it into the sewer. This was all June beer; that did not include the 300 barrels; these three hundred barrels had been served to customers and they returned them; then the revenue condemned this. That beer was worth $7.00 a barrel without the revenue stamp; if it was good beer it would have been worth $7.00 a barrel without the revenue stamp: when we destroyed it it wasn't worth anything at all or we wouldn't have destroyed it.

It was on or about the 2d, 3d, or 4th of June that I had the conversation with Bennett. I sent for him on two or three occasions in the month of June.

Q. Was any beer brewed by you during the month of June or May, or up to the 3d of July, and mixed with the beer that was good

prior to the mixing? Was any other beer destroyed? Did you lose any other beer by reason of these brewings in June from this article?

A. Well, part of it; yes. It is hard to say how much. We had to get along the best we could in order to hold the trade, and stopped at once using the cerealine when we found it was the cerealine. After the 3d day of July we brewed beer with pure malt. We mixed the old beer then with the young beer brewed with pure malt. The young beer is two or three days old when we mix it with the old. It is then sufficiently fermented to mix with the old beer. The beer that we mixed with the pure malt after the 3d day of July was brewed about the latter part of April. After that it continued good. That beer was good, any more than it was rather young. We had to take it younger than was usual in order to get over the other trouble. It was returned—the other. The beer was good, only
49 it was a little young; that was all. When we ceased mixing the old beer—the beer that was made ahead of July—with the beer made with this bad cerealine, that beer—the old beer—was good. After we stopped using this cerealine we had no bad beer. The young beer wasn't bad. It had a good taste and gloss that was not bad. It was only a few days until we got in rotation again. There was other damaged beer in our cellar that was directly traceable to this cerealine. It was 1,730 barrels and 750 barrels. That was brewed in the months of May and June.

Q. That was a part of this 4,000 barrels?

A. Yes, sir; over 4,000. The revenue condemned it. I kept it back on your (Mr. Town's) suggestion on account of this case coming up. We would have kept the other 1,580 barrels, only we hadn't room, so we kept that back until December, 1884; then we kept 750 barrels back until November of this year. It was finally run into the sewer by the revenue officers. The beer that we lost by reason of this article was 265 barrels in July and 1,580 barrels that was run into the sewer in October, 1883.

Q. And brewed during the month of June, and the 750 barrels run into the sewer, a subsequent date, also brewed at this time, and the 1,730 barrels?

A. Yes, sir; about that. I have the revenue books here.

The COURT: That makes 4,325 that was destroyed, if I have footed it right.

I saw Mr. Thomas after the bringing of this suit in my place of business. He called upon me. He bid me the time of day, and I told him that he had the best of me; that I didn't know who he was. He told me he was one of the firm of Gaff, Gent & Thomas, and he said, "I am Mr. Thomas." I said, "Yes?" And he wanted to know if I hadn't got tired of the suit and if I didn't want to withdraw it. There was a balance then of six hundred and odd dollars that I owed the firm, and that by dropping that I might drop the suit. I says, "No, Mr. Thomas, if you are one of the firm you have
50 ruined me." I says, "That firm has ruined me, and," says I, "there must be some remedy to pay me back." And he

says, "Well, we will see. We are hard cases. We have got several millions of dollars." He says, "We have got more money than you have." I told him that their bad cerealine ruined me and my suit was for that.

Q. He referred to this suit?

A. Yes, sir. (Counsel for defendants objects to this as irrelevant.) When I told him the way the cerealine had ruined me he never answered; he never said it was bad or good or anything else. He thought that I ought to drop the case by them dropping that bill that I owed him. I still owe him $640 for malt during the month of June.

Counsel for defendants concedes that the cerealine has not been paidfor, and that a suit is now pending, and moves to strike all this testimony out.

Counsel for plaintiff objects.

The COURT: I don't see what it amounts to.

COUNSEL FOR PLAINTIFF: It amounts to an allegation made by the plaintiff to one of the defendants that his bad cerealine had ruined him, and that he neither denies that his cerealine was bad or asserts that it was good.

The COURT: I think it may go to the jury.

The defendants except to this ruling.

On cross-examination the witness testified:

Q. Have you your revenue books in court?

A. I have my revenue books in court. I have all the bills of Gaff, Gent & Thomas. I got some of these from 43 Water street and some pier 1 and pier 4, North River. I never bothered about who kept the storehouse at 43 Water street; I bought directly from O. O. Bennett. I don't know the name of the man who keeps
51 the storehouse at 43 Water street; I was told yesterday it was a Mr. Green. We carted the goods from New York to our brewery. My drivers were my cartmen. There is different drivers; I cannot give the names. John Pfeiffer is one I know; he is now in court. It is hard to say what other drivers I had at that time; I cannot remember their names; I had six or seven. I cannot remember the names of those I had in 1883. There are none of them still employed, as I know of. I don't know where they are now; I tried to find them. This man isn't working for me now. I did not go after these goods personally myself. I was not present at any time when the goods were delivered to my teams. I cannot from my books tell you where each truck-load of goods was taken from during that period of time—between the 31st day of April and the 3d day of July, 1883. I purchased from O. O. Bennett. One time I sent the wagons to one place, and another time they would send it to another place; I don't know where the wagons went. I sent the wagons to No. 1 Front street, in New York, to the office of the defendants; I sent my wagons in all cases to No. 1 Front street, and they got directions where to go and get it. I saw Mr. Bennett first in 1882, in my office, in Brooklyn. I don't know

as there was any one present at that time; saw him in the afternoon, about along between two and three. Mr. Bennett's salesman was not with him. Previous to that the salesman offered me goods, but I wanted to see Mr. Bennett first. The salesman had a sample of the goods that he sold. He did not sell them to me by sample. I would not buy until I had the guarantee of the firm.

Q. You didn't buy any of these goods, then, by sample?

A. We tried the first brewing and found that to be good; then I continued to buy by the guarantee. I had no sample of the goods that were purchased between the 3d of April and the 3d of July; I only had one sample; that was when I first purchased. When the first goods were taken to my brewery they were taken up in the hop-room; the hop-room is a dry room on the 3d floor. Hops were in my hop-room at that time. There were no other brands of cerealine or malt in the hop-room at that time; I never purchased any from anybody except in this way. This cerealine came in bags.

I don't think I kept it a week before I sold it. We gener-
52 ally got it every day or every other day or every three days.

I am sometimes at my brewery at 4 o'clock—3 o'clock in the morning. My foreman has the supervision of the management of my business. I generally look all over to see that things are going right. I usually see the materials when they are put into the mash tub, and I saw this cerealine when it was put in. Sometimes I had it in my hands. I never dreamt of examining it. You couldn't tell anything by looking at it. I had some of that in my hands that turned out bad, but I didn't see anything the matter by its looks. It looked about the same as the other. It looked a little off, but you could hardly tell it. We only thought it looked a little off after we found out that it was that. We thought it didn't have the natural color that it really had. I am not positive of that now.

Q. You didn't remember what color it was until your beer was spoiled?

A. O, yes; O, yes.

Q. You did?

A. Yes, sir.

Q. You noticed the color at the time you looked at it, didn't you?

A. The color wasn't so bad; no, sir.

Q. You say you noticed some little defect about it when you looked at it?

A. After we found out, after I saw the lump of that, it didn't have quite the same look. I saw the lump on the 3d day of July. It was a lump about as big as my two fists. It was moldy—moldy cerealine. I found the lump the day it was unloaded.

Q. It was unloaded that very same day?

A. Yes, sir.

Q. You didn't use it in the manufacture of beer?

A. Guess not; no, sir.

Q. You didn't put any of it in any?

A. No, sir; we had it home and saved it for a long time. I have not got it there yet. The men have destroyed it. I am sorry I have not got it. The lump was discolored. It was kind of the color

of the wall (indicating wall of the court-room), of the red wall. The lump was offered to me by my foreman. He took it out of
53 the bag. He did not take it out in my presence. My foreman found them. I didn't find any of those lumps prior to July 3d; never heard of them.

Q. And that quantity of cerealine you never used at all?

A. Yes.

Q. The quantity that you purchased.

A. For July? That in which the lumps were I never used for anything. The foreman brought me a lump of this cerealine and says, "I guess I have found out now where the trouble comes from." When I saw the lump I tested it; put it in hot water. I found lumps in about 6 or 7 bags. I think it was the 3d day of July I found those lumps. I have not bought any goods from the defendants since that time. That was the first time I had observed the lumps. Those bags were in the hop-room when I examined the lumps, where all the other bags of cerealine that I had received had been placed when they came into my place. I examined all the bags we had on hand that day. No; I didn't examine them all. That lump was enough.

Q. You just told the court you examined the rest and found where there were lumps.

A. I said I examined those 6 or 7 bags and there were lumps in them and that was enough. I suppose there were about 30 or 40 bags. I don't know how many there was that day, but I found the lumps in them. I didn't examine the 6 or 7 bags myself. The men that were unloading them found the lumps and showed me, and, of course, I saw them. The men opened the bags and looked at the lumps in my presence. They found the lumps and they were hard as stone, and those they opened and got the lumps out and showed me. The bags that we didn't examine—the 30 or 40 bags—we used for cow feed. We made the offer to Mr. Bennett to return the bags to Gaff, Gent & Thomas on or about the 5th or 6th of July, 1883, at my office. I showed him the lumps and he said it might have got a little wet. I offered to return him the goods then and he wouldn't have anything to do with it. He claimed that the
54 goods were good. He said they had got a little damp. He told me these goods were good goods. He said they had got a little wet, and he admitted that they couldn't be good. We offered to return him the 30 bags that were wet, and he said the goods were sold and delivered and he wouldn't take them back. We used to get a load every day or every other day—about 25 or 30 bags to a load. This lot I speak of is one load that came. I sent for Mr. Bennett and showed him the lumps, and told him to take it back, and he said he would not. I couldn't tell where that delivered on July 3d came from. We sometimes bought cerealine from Gaff, Gent & Thomas, and sometimes meal.

Q. Now, on the 3d day of July did you buy any meal?

A. I couldn't say whether it was meal or cerealine.

Q. You couldn't swear whether these lumps that were found—

you couldn't swear whether they were in cerealine or whether they were not meal?

A. They guaranteed both goods to me as first-class goods.

By the COURT:

Q. Was this meal that you looked into or was it cerealine?

A. I couldn't say without looking at the bill. That lump that I examined was either meal or cerealine. I couldn't say whether it was cerealine or cerealine meal; it was used for the one purpose. I can tell the difference between cerealine and meal when I see them. I don't know what was in those bags. Cerealine meal is finer; that is all; it is the findings of cerealine. I will swear that on the 3d day of July I bought cerealine from the defendants; the goods that I bought was all cerealine. I believe I bought both cerealine and cerealine meal on the 3d day of July. I couldn't positively swear to it. I bought cerealine; they are both cerealine. I couldn't say whether the lumps we found were in the coarser grade of goods or the finer grade of goods.

(It was conceded by the plaintiff that the cerealine bought
55 on or about July 3d, the cerealine that the plaintiff alleges was bad, has not been paid for, and suit has been brought for the recovery of the price and is now pending.)

Q. When these other lots of goods were being used by you in the manufacture of lager beer, and you, as you have testified, were constantly going around and looking at everything, you didn't discover any of the lumps like that, did you?

A. No, sir; if we had we would have tumbled to it quicker.

Q. Could those lumps have been caused by the corn being frost-bitten before it was manufactured?

A. The corn—I should judge by the corn being frost-bitten that it isn't a right corn; that it is likely to get moldy and hot; it is likely to get hot and moldy and lumpy; but I am not an expert at it. I think this suit was first brought in the fall of 1883. I had conversation with the customers to whom I sold this beer after its return. I knew a man by the name of George Roming, keeping a saloon at No. 171 Essex street, New York. I had a conversation with him about this beer. I told him that I acknowledged that the beer wasn't as it ought to be; that I couldn't help it. I wanted him to hold on until we made our beer and do the best he could. Our cellars are kept cool by an ice machine.

Q. At what temperature will beer sour?

A. Why, it will stand 6, 7, or 8 degrees Reaumur. I judge that would be about 44 by the Fahrenheit thermometer; that is about freezing. If our beer cellars get hotter than that our beer is very liable to be soured, if it stays there. If we find the ice machine isn't stong enough we put ice in it on hogsheads or tops of hogsheads, not in the beer. I had an ice machine during the months of May and June, 1883. I got the ice machine from Rankin, and it was Rankin's manufacture. It was not as strong as it ought to have been. I am not using it now; had it burned out.

Q. Were you using it at the time you were burned out?

A. Not then; it was in the winter. I was using it then;
56 yes. I had no trouble with it during the months of May and June, no more than it was too weak; my beer cellars did not become hotter during those months than I desired them; my ice cellars did not get in such a condition during that period that it was utterly impossible to use it at all; I did not tell George Roming that my beer was ruined because my cellars got hotter than they ought to be on account of the failure of my ice machine to get it down; I did not sell George Roming any more beer; I did not have a conversation with Charles Follett, of 141 East 8th street, New York city; he was a customer of mine in 1883.

Q. Did you make an affidavit in which you swore that he was a customer of yours, and you lost his trade?

A. I couldn't say positively; I don't think that he had beer in 1883; still, I won't be positive; I know they both owed me money; they are both skins.

Q. Will you swear that you didn't make an affidavit in which you swore that in 1883, at the time of the sale of these goods, Charles Follett, of 141 East 8th street, New York city, saloon-keeper, was a customer of yours, and because of the bad goods you sold him you lost your trade?

A. I will not be positive; I did not, that I know of, have a conversation with Charles Follet during the fall of 1883 about beer; if you will wait one second (addressing Mr. Phœbus, examiner), I believe I got both of their papers right in my pocket; no, I haven't got it.

Q. Did you have a conversation with Charles Follett, who is a saloon-keeper at 141 East 8th street, New York city, anywhere near the time that these goods were sold to you by Gaff, Gent & Thomas, about beer?

A. I don't know; I might have had; I had a mortgage against the man, and I know he chucked my figures out; I had several talks with him, but I couldn't say whether I had any conversation with him about this bad beer; I didn't tell Mr. Charles Follett at any time that I had made a brewing of bad beer, and that it had been occasioned by my ice machine and the overheating of my beer cellars; I know August Spinnacker, 4 Bleecker street, New York city; I did not myself have any conversation with him about beer about that time; I couldn't say whether or not my representatives had; I did not tell August Spinnacker at any time that I had lost a lot of beer by the failure of my ice machine to keep my beer cellars cool, or anything like that.

Q. Did you sell him any of this beer that was bad?

A. I sold them all beer as long as they would take it; I couldn't say whether I sold him any of this bad beer.

Q. (Showing witness paper.) Is that a copy of your complaint in this action?

A. I don't know.

57 COUNSEL FOR DEFENDANTS: I offer in evidence the copy of the amended complaint and the schedule attached thereto of

customers whose trade Mr. Kiefer alleges he lost by the injury complained of to his beer.

Counsel for defendants then reads the names in the schedule attached to the affidavits.

Witness continues: I cannot remember whether I had a conversation with Mr. L. Wiehl, 269 East Houston street, New York city, about my bad beer; I did not tell Mr. Wiehl, as I know of, that the damage to the beer was occasioned by the overheating of my cellars, caused by the failure of my ice machine to properly cool them, although you might—in order to hold trade—you might tell them anything; I couldn't swear that I did not; I did not, that I know of, have a conversation about this time with H. W. Broomer, of 237 East 26th street, relative to my beer being bad; I did not, that I know of, tell Mr. Broomer that the change in my beer was caused by the overheating of my beer cellars, which was caused by the failure of my ice machine to properly cool it; I don't think I saw one-quarter of these men myself; I don't know as I had a conversation about this time with Mr. A. Cotter, of 81 Rivington street, New York, relative to my bad beer; I will swear that I did not tell Mr. Cotter that my beer was damaged because my beer was overheated by a failure of my ice machine to properly cool it; I did not, as I know of, give that as a reason to any of my customers; I bought part of the ice machine from Mr. H. B. Scharman; I bought a second-hand ice machine from Mr. Scharman and used part of it, and the other part of it Mr. Rankin fixed up new; the main part of the machine was new—three-quarters of it; don't know how long Mr. Scharman had used the machine before I bought it; don't dispute that the machine wasn't up to the thing it ought to have been; I have proof here to show that I bought ice; I know Mr. Schalk, who was at one time one of Mr. Bennett's salesmen; Schalk was not with Gaff, Gent & Thomas at the time of my trouble; I might have had a conversation with him at that time; he was there at my place, representing Gaff, Gent & Thomas; that was long after the suit was commenced; I do not know if Mr. Schalk was at my place in July, 1883; he was not; I might have shown Mr. Schalk the piece of the lump or hardened corn material that I have described to the
58 jury; it was Mr. Bennett who came to see me when I discovered these lumps in July, and not Mr. Schalk; when Mr. Bennett was in my office I think that he and I were alone; when Mr. Thomas paid me a visit after the commencement of the suit, there was a gentleman there, but I don't know whether he came with Mr. Thomas, or whether he was there; he was present when I had the conversation with Mr. Thomas; he was there in the saloon; I don't know whether or not he was close enough to hear our conversation; he was quite a distance away.

Counsel for defendants:

Q. As far as I am?
A. Oh, yes; further than that.
Q. As far as Mr. Thomas?
A. Yes; fully that.

Q. About that far?

A. Yes, sir. When I had the interview with the revenue officer the beer was in tanks and in hogsheads. There was none of it in small kegs at that time. He examined and tested the beer, and I saw him test it. I made a written application to the revenue office. I went to the collector and reported, and I guess I signed a paper. I told him I had beer up home that wasn't fit to use. I didn't tell any of these officers what ailed it. I went to the collector three times. I had three different lots condemned.

Counsel for plaintiff:

Q. When did you cease using this ice machine?

A. I stopped using it after the fire. I continued to use it until I was burned out; that was in last year, in October or November. After I stopped using this cerealine and used hops I had no trouble with the beer that I made in July and August. It was good beer, and I used the same ice machine; I used it all that summer and last summer and in 1882. I had no trouble with my beer in 1884.

Counsel for defendants:

Q. Isn't it necessary to keep cerealine beer several degrees cooler than it is hop beer?

A. No, sir.

59 FREDERICK LICHT, being duly sworn and examined as a witness for the plaintiff, testifies:

I am a brewer; have known the defendants in the case about since 1882; was in their employ from September, 1882, to July, 1883; was engaged by them to sell their goods and intoduce it to brewers and show them how to use it—cerealine and cerealine meal. There is no difference between cerealine and cerealine meal, except that one is the screenings of the other. After it is made it goes over a screen, and what falls through is the meal and the other is the cerealine. They used to use it, before I got acquainted with them, for food, and I have introduced it myself for them for brewers' use; they say it is patented. I went through New York, Buffalo, Syracuse, Rochester, Boston, Albany, and as far as Baltimore, beginning in 1882 and continuing until July 3, 1883. I sold it extensively to brewers; I sold a great deal of it for them. In the latter part of June, 1883, I went to Indiana to see what was the matter with the goods. I saw Mr. Thomas at the office; saw the superintendent and the miller. I got there to Indiana about four or five o'clock in the afternoon; took a wash at the hotel, and then went to see the mill. When I got there the office was closed, and from there I started down to one of the mills, and I saw the superintendent and miller—I forget their names—and then I mislaid the papers. However, I asked them, "What in the world are you doing?"

COUNSEL FOR DEFENDANTS: You needn't answer that part of the question.

The next morning I came to Mr. Thomas in his office, and he was

very much astonished to see me there, he said, and as I spoke to him says I, "What in the world is the matter with your goods? There is a terrible sight of complaint, and our goods sent back from all the customers I sold to," and he says, "Well, Mr. Licht, we can do no better, Our corn in this section of the country is all frost-bitten. It is the best we can do; we can do no better; it all got frost-bitten, and we can't get no better corn here to make it." "Well," says I, "you better not make any goods. I would just as lief sell a baker flour with arsenic or poison to make bread as to sell a brewer that to make beer with." "Well," he says, "it is the best we can do. We can't do any better; we can't get any better corn in this section of the country." I saw the corn they were using in the mill at that time in the morning, before I went to his office. I was there in the latter part of June.

Q. Now, tell us what you saw in the corn?

60 COUNSEL FOR DEFENDANTS: We are not trying the issue of any cerealine made after July 3d, and this was in the latter part of June.

(Objection sustained. Plaintiff excepts.)

A. I think I was there some time after the 18th—about the middle of the month or latter part of the month. I saw them handling at the mill at that time white corn, which was what I call shrunk; the kernels shrunk up like a pear or anything like that that isn't alive. It shrunk up and gets small kernels, and I saw in one handful about ten or ten to fifteen black kernels—that is, decayed kernels—which shows in the ears of corn. I picked them out. That is what I seen done. The first of all the complaints I heard I reported to Mr. Bennett. It was in June that I first heard complaints from my customers—about the middle of June. I went west in two or three days after I heard of these complaints. The first I heard of the complaint was after I got back from a trip from Buffalo to Syracuse and through that section of the country. That was some time in the fore part of June. That was the first. Some of my customers had been using this a year and a half. They had been using it through me since the September before. I know how good cerealine affects beer. The effect of brewing is after the fermentation, when goods are sold and have been ripened properly as nature would ripen them. They don't have what we call an after fermentation when they are refined. Instead of refining, the other will not refine. After it is frost-bitten or is not matured in its growth it will not refine. You can't get it clear. The beer stays muddy and riley and the yeast becomes from one batch to another worse and worse, which is a hard thing for a brewer to tell—to get into it at certain times. It will show at certain times and at certain times it will show less. The first yeast we use in brewing and the first bad goods we get that beer wouldn't show quick, as that stock is good and it works it up, and the next stock will take it up and work it and the next will get worse, and goes on. Finally, by using it longer it will get so bad our beer will all turn. I have seen it in a number of cases in these goods and also in other goods.

Q. What effect has frost upon unripe corn?

A. Well, frost on corn—of course, as corn has been in its milky stage at the time it gets frost it doesn't get ripe, and some of the kernels as it gets more or less mature will turn black and
61 rot, and the other seems to be wilted up, and when they make that up into meal it all sours and spoils. It would get what we call ——, and get a handful of that in the trade—a man will get it in their hands and squeeze it and it would crack like a glass ball, and there are —— all through that meal.

Q. When did you discover this?

A. I didn't discover it until I come back from Buffalo. The man that sent their bags back, some of it lumpy, and it was hard in the bag and turned what we call foxy color, and a good cerealine will stay in color well. If sound it never spoils. I discovered this defective cerealine by the complaints, and I examined what they sent back and found it was lumpy and off color, foxy, which it wasn't at the commencement, when they took it there; hadn't got foxy. They sent their goods from Indiana to pier 4 and it all got bad on the pier. Sea flour is made out of some parts of this. That also turns, and I know that parties wouldn't give a cent a barrel for sea flour, because they wouldn't use it. They was afraid of it. It used to have a very good name. Thomas told me the corn—there was no better corn that they could get in that section of the country, because the corn they had there was bitten by the frost. He showed me the corn there. He told me a corn and showed me some of the corn in his office which they had in that section of the country to make it of. He said he could get no better corn than that, and I told him that that wouldn't do; that I would not sell any of that to brewers, because I would only ruin him and ruin myself. Before I came back I went to Terre Haute and I saw some millers there. I came back to Mr. Gent and met him at the New York office. I asked him —. Mr. Bennett said, "There is Mr. Gent now. You go into the side room and have a talk with him," and we went into the side room and I told this was a fearful state that things was in; that I have partly given up my other business and attending to the cerealine, and I say the state it is in now I am going to lose all my trade, and I told him that they would certainly have been sued by Mr. Stafs, of Newark, if it hadn't been for me settling it, and I wouldn't undertake to sell any of their goods as long as it was in that kind of style. "And," says I, "you must try and get better goods than this." He says, "Well, we cannot get any better corn in our section of the country; the corn is all frost-bitten." Says I, "You mustn't send it out; it won't do." Says I, "I can't sell that and I won't sell it."
62 He says, "Well, we are able to run our business without you." "And, well," says I, "it is none of my business, your running it, and everybody is complaining." "Well," he says, "Mr. Licht, we will attend to our business and you will attend to yours." Says I, "All right," and I left him. On about some time in October I saw beer in Mr. Kiefer's place. I do not know when it was made.

On cross-examination by counsel for defendants he testified as follows:

Q. When was it that you quitted the employment of Gaff, Gent & Thomas?

A. After they had made this bad goods. I think it was the middle of July. I had not stopped working for them when I saw Mr. Gent in the office at No. 1 Front street. I did not work for them after I had that conversation with Mr. Gent which I just now described. I quitted there then. That was the reason. When I went to Indiana I went to Terre Haute and stopped to see friends and I come back, and I think it was three or four days after that that I had this conversation with Mr. Gent. I have never attempted to obtain a patent on the making of this kind of goods—not of their kind of goods.

Q. Oh, not their kind of goods—I mean a patent for goods generally similar to this cerealine from some kind of corn?

A. Corned goods for brewers' use. I obtained that patent some time after I left, after I was down to Indiana. I have had it in view before I ever saw them. I had no talk about it with Mr. Gent or Mr. Thomas. I said nothing to any of the people in their employ about it. I went into the mill, not until I was asked. I had no other purpose in going to Indiana other than reporting about this meal. I mentioned no other motive to Mr. Thomas or Mr. Gent.

Q. (Showing witness sample of meal). This meal that you speak of is made—that is the general character of it, isn't it?

A. That is the character of the cerealine, as they call it; yes, sir.

Q. Is that a good article?

A. Well, if it was all like that it would be good, yes—yes, that it good.

Q. These defects that you found in it—how would it look?

A. It would have these black spots in it, decayed kernels, and the corn would look a different shade; it wouldn't look bright when you looked over it; it would look dark, like chalk or lime. The lumps come in after you send it from the mill; they get it in by the
63 goods not being sound; it sweats. These goods, if it is properly kiln-dried and sound goods, they will not sweat any more after that. Goods decayed in ripening, after it is decayed in that way, it will sweat; the sweating will commence after they pack it. I don't know how this was packed that I sold. They were put in bags—large sacks. I should judge some bags had ninety and some a hundred pounds; I am not sure; they had different size bags; the bag was not the ordinary meal bag; they was extra bags made on purpose for that, tied up at the mouth; I suppose they were shipped in that way from the mill; I didn't see them, but I suppose the goods came in them. If the bags got wet it would spoil the cerealine; it would turn it into lumps, and also spoil it as far as it went, but the other part would be sound, just as far as the wet would go, like a barrel of flour or any other goods. After I see the goods come back from those parties (his customers) and examined it, then I discovered the shade of brightness and the dullness; then I could tell, but I couldn't tell before. In the course of my business I take

orders and it would be shipped to those parties and they might return it and then I saw it. I think one or two cart-loads were returned to me from, I think, four customers. I only know Mr. Stafs, Newark, New Jersey, and Freeman Greaves, and some others, but I can't think of their names. I returned them back to the firm. The brewers shipped them back to the firm; they wouldn't pay for them. I went to see them and they threatened to commence suit, and as I sold the goods myself for the firm I told them that it would put me in trouble. That is the only reason they didn't commence suit. When I came back my son told me—he says, "Father, there is some trouble; we have sent these goods to Newark and they have sent so much back." I went to see these parties to see what I could do and keep my trade with them.

Q. Were you authorized to make collections and did you make collections for goods sold?

A. For whom?

Q. For Gaff, Gent & Thomas.

A. No, sir; for my own goods. I bought right out and sold to them. These goods are bought right out by me and sold to these parties. It was my own trade before I came to be out for them. The brewers shipped the goods back to Gaff, Gent & Thomas, New York.

Q. What became of your trade with regard to Gaff, Gent & Thomas in the purchase of those goods if they were yours?

A. It went up in a balloon, as the boys say. I did not
64 pay for those goods that the Newark men returned. The cerealine is made of white corn. I don't know where it is grown. There is a great deal of white corn down South, very fine. I know the distinction between white corn and yellow corn. In the East and Indiana they grow white corn. I saw white corn in Indiana when I went out there. I saw the corn they shipped me. I have not seen it to any extent. Mr. Thomas and Mr. Gent told me it was the corn grown in their section of the country. It must have been corn of the growth of the year before that they shipped me. I don't know anything about it. It must have been the year before: it was what was called late white corn. I didn't see any yellow corn about it. I seen four or five cart-loads of corn on the truck, I think. This corn was shelled when I saw it. I seen the corn in the shoot in the mill and held my hand in the shoot and took out a handful and examined it. I saw black corn in it all shrunk up. The corn that I examined was, presumably, the same general character of the corn they were manufacturing. All I seen was corn that was almost shrunk and naturally corn that gets ripe. I noticed that was corn that was shrunk, because they told me in the mill the night before, and I looked at it and I found the corn shrunk close and the black kernels in the corn, and they said they couldn't make no better goods out of it. They told me that at the mill that night. The miller and superintendent in the place told me that.

Counsel for defendants moves to have all this stricken out.
(Motion overruled; defendants except.)

Q. You don't know whether or not the cause of that corn shrinking was because it was frost-bitten in the milk?

A. No; experts on corn could, I think, tell corn that had been frozen in the milk. I don't know what an ordinary observer could do. I could. I seen the difference between that and the corn that was frozen. I think the milling of that corn that I saw there would be different from other corn that wasn't shrunk.

Q. Can you tell me whether or not shrunken corn, such as you saw, would make, if it was hulled and made as this is (referring to sample)—would it make a milling that would resemble that, or would it not?

A. It would make an article like that, but, as I have said before, it would have a dull cast, and there would be black specks in it, and they can't sift it out, and I found that in it.

65 Q. You desire to have the jury understand that if there were black specks in this there would be black specks in it?

A. Yes; and there would be bad corn in it, and if it would be made of bad corn it wouldn't have that bright cast; if it wasn't made of bad corn it wouldn't have black specks in it.

Q. How is this done?

A. Well, you might go to work and mix in that now something black and thoroughly mix it, and you could hardly tell it—only by having the two samples together to show the brightness.

Q. You mean that you could mix something black, as gunpowder, with that and we couldn't tell it was made of bad corn?

A. If that corn was what I call dull cast and the black was in I could tell it. I haven't said I was exactly a chemist, but every brewer ought to be a chemist. I am a pretty good brewer; make good beer.

Q. What I want to know is if there is any chemical difference between this meal and this corn here (showing a sample of corn).

A. Well, one is what breaks off fine and the other is coarse; there is none.

Q. Take this corn that you saw made into cerealine; would there be any chemical difference between it and the other ordinary cerealine, such as you had been selling, if that corn sack, as you saw there, was made into cerealine with the black specks in it?

A. How could you get them out; can you tell me? You would have to pick them out; you can't do it.

The COURT: He wants to know whether the shriveled kernels would show.

A. If you show this to the jury and if I had the other you wouldn't see that brightness on it; you see, it would be what we call glossy; the other would be dull looking. It was made out of the shrunken corn and would be of a dull cast and would look as a shade of either ashes—white ashes or chalk or lime milk. It would have that dullness. By being an expert a person could tell that these were

66 good. Any brewer can't tell, because there is not every brewer that knows about the goods being snowy or the shade of those casts, because they don't understand it. If I hadn't been

through milling goods and milling different kinds before I went into these goods I would have been lost, but I have been all through that; linseed oil works, and I have been through that.

Q. You could tell it was good?

A. Well, other people could tell if they knew. In making beer we use hops and malt and corn products, or we use rice; we use wheat; we use malt wheat. The malt does not go into a fermenting tub right away; not until we get done with it in other stages. We commence to make our mash about two or three o'clock in the morning—we get up early—and then we start brewing with our malt, and a certain quantity of that in it——

Q. What do you do when you brew the malt?

A. We put in the malt and then we put in this corn product with it, and we keep on mashing and run our temperature until we get——

Q. What temperature do you take it to?

A. There is no one who would like to expose their way of doing. We take it to fifty-five or sixty degrees temperature. We keep mashing all the time. By mashing I mean stirring around in a circular tub. When it reaches 55 or 60 degrees we let it stand still an hour or so and get our breakfast. Then we go to work; you should let it stand, and then draw it off into a kettle, at fifty-five or sixty degrees temperature. We draw it in the kettle, and then we boil it up. You can't get it any higher than boiling point; you boil it, and then it is boiled. Then we draw it off in the mash tub and put it in the kettle, and we don't take it off until we get done with it. We draw it off and run it in the mash tub and put it in the patent cooler, and then we take it in the fermenting tub. We get it in a certain percentage of the gravity of sugar or sweetness, and then we take it out when we get it to that per cent. that we
67 want it, either 13 or 20 degrees, Reaumur scale, then we take it from that and put it on the cooler. In the fermenter we put yeast in it; ferment it with yeast. In 48 hours we will see the commencement of the fermentation started, and then it will last according to the temperature or coldness of the weather or the roomt it will then last, maybe, from eight, ten, or twelve hours before I goes in what we call kreisin; then, after the kreisin, we want to put in all that kreisin, all that ferment; we use it to liven up this other beer. After we get fermenting in that tub we have to wait until the yeast falls back; we call it the after fermentation. After the yeast falls back the beer comes as black as ink on top. When it is refined then we draw it off in what we call rest casks, and it lays there to give it age. It stays there from a month to two months and some as high as three months. Then we take this back to what we call a refining cask, and then we put a certain quantity of this kreisin in it; it is then fermented; then we ferment that beer and let it work out of the bung, and then, in 48 hours afterwards, we draw it off in kegs and send it out to the customers. During this period of gestation too cold would make it go slow, and too hot hurries it on a little too fast. You want to be careful that everything is clean and also

that you rack it off at certain times, when the beer has got to a certain pitch.

By the COURT:

Q. What will happen if the fermentation stops at any time?

A. It must stop, or else we will never get beer. It must refine, and when it gets through its fermentation it stops; and if it has an after fermentation we don't know when it will stop. It will never make beer, maybe. I have seen that done where the fermentation was stopped, and I saw the next fermentation come up and spoil the whole beer; there is many reasons for that second fermentation; inferior goods sometimes does it, and nothing else as I know
68 of, except the yeast might be affected; isinglass has something to do with refining it, when we put it on ship casks; sometimes they put it in; finish it with isinglass. Heat would be produced by fermentation; I have known this. We have went to work and put beer into bottles, and got it to a boiling heat, and got it cooled down to ship, and it did not spoil it. They boil it to-day that way in New York. It might spoil it if it were not heated by a second fermentation.

On the redirect examination (by plaintiff's counsel) he testified:

—. What effect would frost have on unripe corn?

A. It would spoil the beer; it would spoil the fermentation of the beer and it wouldn't refine. I know of that and other cases it was the same way; when it is in the milky stage and is cracked it would not refine; that is what I said before. I never detected any difference in the luster of this cerealine or its condition until after my customers began to return their product.

Q. Now, could any one but an expert detect the difference in the shade?

A. Not well.

On recross-examination (by counsel for defendants) he testified:

Q. You say that frost-bitten corn will injure the corn, or injure it so that it will hurt the beer?

A. I found that out since; yes, sir; I do. Cerealine from ripe grain will not have any effect on the beer. If in the milk in the field it gets frost-bitten it hurts the corn. You can't freeze corn or any cereal that you have when it is ripe. Put in as much frost as you like and it won't hurt it. I have learned that since by practising on it—on white corn and wheat. I done it for the purpose to see what was in it. I am practising on different occasions. It had no reference to this case. I have took corn that wasn't ripened—unripe corn that was frost-bitten; it was shrunk, and I found that it acted that way; the distinction between ripe and unripe corn
69 is that the unripe corn is in the milk, and I took unripe corn; I don't know from whom I took it. I obtained two or three or four ears; it was in the husk. I found out that corn that was in the husk that was frozen would injure beer. I ground it up and brewed it. I made the experiment eight or nine months ago; it was the curren

year's corn that I used. When I tried it the kernel looked like ears of pop-corn that was shrunk, that you have seen dried. It wasn't frozen when I got it. The parties that I bought it of told me it wasn't frozen, and it looked like that corn I saw down there. You cannot shell corn that has been frozen on the cob right away. I shelled this and ground it in a small mill after I had made the meal.

Q. What did you do then?

A. I used it—brewed it. This was the last part of the summer. It was last fall's corn that I was using. When I got the beer it didn't refine. There is nothing that goes in the keg to refine beer. Isinglass is used to hurry it up a little; that assists to refine it. That is not used extensively among brewers. We use, maybe, a pound or two a year. We also use what is called shavings in refining; they are made of birch or beech wood and the sap boiled out perfectly clear. I didn't use anything in my experiment for refining. I wanted nature to refine it the same as it always would; it was only a small sample. I was employed by the defendants on a commission. The agreement I made with them was to travel for ten dollars a day and all traveling expenses, and five per cent. under the first lot of goods that I sold to the parties for the future. The arrangement was satisfactory to me, and I guess it was satisfactory to them. I sold a good deal of goods up to this fall-out camp, and I told them I wouldn't sell that goods. I was doing very well; I was selling a good many goods. I told them I wouldn't sell any more of them goods under any consideration. I quit them in soliciting for them any further, and Mr. Gent sent me a letter that he didn't wish me to intercede for any more custom under the commission.
70 I went over there and told them I didn't want to solicit for any more custom on the goods on a commission, as the goods were not good. I had received that letter from Mr. Gent before I went over there, but I told him a few days before that I wouldn't sell any more. His (Mr. Gent's) book-keeper wrote that he didn't wish me to intercede for any more custom under the commission. I got that letter in reference to going back there the same day. In the letter Mr. Gent said he did not want me to solicit any more trade under the agreement. I didn't get only ten dollars on the road. I was not discharged from their employ because my employment didn't pay expenses. I think it must have been about two months after that, two months and a half after that (January 30th), that I heard that Kiefer in this case was getting bad goods. I think it was some time in October that I first heard that he had any difficulty.

Q. Whom have you been employed by since; what brewer?

A. No brewer; I have sold hops and malts, the same as I did before. I had this trade previous to theirs, but they wanted me to travel, and even wanted me to go Europe, and I wouldn't; they wanted afterwards—Mr. Gent came to me and Mr. Thomas, and—no; I mean Mr. Bennett and Mr. Thomas—wanted me to fix a price—that was shortly before I went to Buffalo—and state what I would travel for them altogether for.

JOHN KEIM, being duly sworn and examined as a witness for the plaintiff, testifies:

I live at 101——street, Brooklyn. I knew Gaff, Gent & Thomas in 1883. I had business dealings with them. I am not a brewer. I have dealings with brewers. I sold goods of Gaff, Gent & Thomas; I sell to-day. I buy of Gaff, Gent & Thomas and resell to brewers. I sold cerealine from them, late in the spring of 1883, on one occasion that was returned to me by a brewer. It wasn't altogether damaged, but it wasn't fit for brewing. I spoke to Mr. Gent about it, and told him it was damaged. I think that was in the month of April, 1883. Mr. Gent says he didn't want the brewers to use it; we should take it all back.

71 Q. You had another quantity returned to you?

A. This was not returned—the other quantity. I got a branch store in Harlem, and this was lightered up by the lighter, and got some damaged by another lighter, by water; and when I got it in my store I found myself it wasn't sound; it was damaged by water. There was no other damage, only water. That that the brewers returned in April was all kind of wet.

On cross-examination by counsel for defendants he testified as follows:

I have had business dealings with the firm of Gaff, Gent & Thomas since 1882. This shipment of cerealine that I refer to was received by me about the month of April; I couldn't say positively what date. It was returned by a customer of mine. I am simply a commission merchant. I sold them a car-load of about 14 tons. The reason the car-load was returned was because it got hot. It was cerealine. I ordered it from the mill for the brewer, and I carted it with my own trucks to the brewery, but I didn't receive it in my store; it went directly to the brewer. Those people had those goods about one day before they returned them. When they returned them I took them right back to Mr. Gent; he told me I should take it back right away. I was in the habit of selling goods to brewers for them. I went to the brewer myself, and me and the owner of the brewery, we went all through and examined all the bags, and I told him right away, says I myself, "That isn't fit to use;" and so he says, "Will you take them right away as soon as possible? I don't want to keep them." It didn't take me long to find out that it was defective. These brewers had not used any of it in the manufacture of beer. They found out it was bad as soon as they took hold of it.

Q. Do corn goods of all kinds and cerealine generally frequently become hot from being wet?

(Objected to as immaterial and incompetent; objection overruled; plaintiff excepts.)

A. Yes, sir; it gets hot very quick. When it gets hot it is not fit for brewing use. The brewer that returned this was not a party to this suit.

72 On redirect examination by counsel for the plaintiff he testified:

Q. When you examined this meal in question how was its condition in regard to being lumpy?

A. It wasn't lumpy at all; it was hot. I could feel that it was hot. It hadn't a musty smell, but as soon as it gets cool the smell would be there.

CONRAD AMENT, being duly sworn and examined as a witness for the plaintiff, testifies:

I live at No. 9 North West street, Syracuse; am a brewer; am brewing now for the Greenway Brewing Company, Syracuse; am a practical brewer; have been so the last nine years. I worked for Mr. Kiefer in 1883; began to work for him latter part of January or first part of February. I worked for him during the months of April, May, June, and July, 1883. I ordered this cerealine in the office.

Q. Did you ever order any from Bennett himself?

A. I was there in the office once. I told him to send me over cerealine. I was sent over by the boss to go over to Bennett's office, at No. 1 Front street, and order some cerealine. I was sent over once. I spoke to Bennett once, and I says, "The cerealine don't look quite as good as it ought to be." He says, "It is just as good as ever; the color don't make any difference if the color don't look quite as good as it used to." That is what he said. He says it's first-class quality; the best he could get, he told me. I told him I was making beer with it. I saw all that cerealine, more or less, that came in during this period. I couldn't see anything the matter with it first off for quite awhile. I am the man who Mr. Kiefer spoke about who discovered the lump there on the third of July. That was the last quantity of cerealine that I had.

Q. Was any of that purchase used?

A. Not of the cerealine. There was some bags; the bigger bags was the meal and the cerealine was the smaller bags. The smaller bags were bad; the coarse—the coarse stuff—that was what had the lumps in it. I took a piece and went in the office and showed it to Mr. Kiefer and said that was the only reason the beer was bad. During the time that we mixed this cerealine we were using malt, cerealine, and hops to make beer. The malt was very good Canada malt. We had some Western malt that was first-class
73 quality; it was first-class malt. I noticed the difficulty in the cellar the first week in June. I couldn't tell then what was the matter. Mr. Bennett came over to see Mr. Kiefer after that. I saw him there. The effect of this cerealine on the beer in June was that it couldn't get the beer clear any more; couldn't get it quite so fine as it ought to have beer—clear; didn't get so fine any more as I used to have. It looked muddy and thick.

Q. Did you notice that first in the old beer that you mixed the new beer with?

A. No, sir.

Q. Which did you notice it in first?

A. After I had found this young beer I tried it first to find out whether it is clear or not, and after I tried the old beer and the new one I couldn't get clear I tried my best to find out what was the matter, but I couldn't; there was nothing the matter with the hops nor the meal. I think it was the second or third of July that I found this cerealine in that lumpy condition; after that I didn't use anything but hops and malt.

Q. Was anything the matter with the beer after that?

A. Well, after the young beer I left on one side, but I come with the other beer all right then. I began then to mix this new I made after the third of July with the old beer that was made, and that was all right. I didn't have any more trouble with the beer as long as I stayed there. I quit there the latter part of July, I think, in 1883.

Counsel for defendants:

Q. You quit along in July after this occurred, during that same month?

A. Yes.

Counsel for plaintiff:

Q. You know what the effect of immature grain in making mash is, do you not—unripe grain?

A. I can't make out what that means; I seen corn before already that had been frost-bitten; the kernel wasn't quite so full as the other; it didn't look right. I am a malster and I know how to prepare and make malt, and I know the different processes through which the grain goes. In making and preparing malt it is necessary to have the very best matured grain that can possibly be obtained.

Q. This stuff supplies the place of malt, does it not?

A. Yes, sir; you cannot make malt fit to use in the brewing of lager beer out of unripe grain.

74 Q. Does frost-bitten corn color it—color the germ? Would frost-bitten corn sprout?

A. Any corn alive, it is just as good as anything else, and if it's frosted it is dead, and you cannot make any more. It is impossible to make beer out of grain killed by the frost. If you get grain for making beer mixed with bad malt or unripe grain or even cerealine I presume you can never get a beer—you can never make a beer. I used to try my best, but couldn't get a beer. The fermentation in the yeast spoiled it first off—not in the first brewing, but after you have had it three or four times—but every time you take the yeast out the yeast gets poorer every time. After you use it three or four times then you can't use the yeast any more; you have to throw it away. These are only the two principal ingredients used in making of lager beer—hops and malt; the cerealine is a substitute for malt. This cerealine that was delivered to us before it was bad did not have the same qualities as malt. Cerealine that had been made from corn that had been killed by the frost in the milk would not brew no good

lager beer; it would not brew lager beer that was fit to drink—that we could sell.

Q. What effect would it have upon a brewing; do you know?

A. You can't get no beer; you can't get anything out of it.

Q. You mean to say those qualities which cerealine supplies in beer would be absent from the beer—would be missing?

A. Well, sugar and starch. Sugar and starch is necessary to brew lager beer; you cannot brew lager beer without it. I saw the lager beer that was brewed about in June; that was spoiled; must have had four thousand barrels or over. I didn't make so much beer out of this corn; I couldn't make so much out of it; got less beer, but I couldn't make nice beer. The matter with this beer was that I got a nice beer and it didn't smell the way it ought to; had a kind of a musky, sticky smell. The first I discovered anything was the matter with the cerealine was when I discovered this lumpy stuff; before that I couldn't tell that anything was the matter with this cerealine. I used it about eight months, I guess; something like that. Previous to this we had very good success, and the beer had been improved. I haven't been with Mr. Kiefer for over two years.

75 On cross-examination by counsel for defendants he testified

Q. How long does it take to make a brewing of beer, to have it ready for use?

A. Two months, three months; stock lager stands to be four and five months old; sometimes longer.

Q. Then Mr. Kiefer didn't make a brewing of beer ready for use from the meal of the 3d of July until the time you left his employ?

A. Oh, yes; he made it every day, right along. I made the kreisin out of hops and malt, and I made it clear out of old stock. For cooling, Mr. Kiefer had an ice machine, and ice besides. Sometimes he bought his ice from the Knickerbockers and sometimes from the Ridgewoods. The last winter we had the ice from the Ridgewoods. We had to have ice regular, right along. Mr. Kiefer did not, as I know of, buy an unusually large quantity of ice between the 3d day of April and the 3d of July, 1883. He didn't have any trouble at all with his ice cooling apparatus. That is the reason he kept on ice all the time. The ice machine wasn't strong enough to cool all the cellars. His beer cellers did not become overheated during that time. I know a gentleman named Schalk; I had a conversation with him over in the office of Gaff, Gent & Thomas. I did not in that conversation say to Mr. Schalk that Mr. Kiefer's ice machine had broken down about this time, and that his beer cellers went to about fifteen degrees Reaumur, and that the beer was soured on that account. Frank Newman was not present at this conversation with Mr. Schalk; Bennett was present. I saw Mr. Schalk in Syracuse after that, and had a conversation with him. He brought a summons up there; that is all. He wanted me to sign it. At first he brought a summons and wanted me to sign it, and I says I can't sign it—to go to court—because it wasn't true. When I was over in Bennett's office we had been speaking about

cerealine. The cerealine don't look quite so good as it used to be and after that I had them lumps. I says that must be them lumps spoiled my beer. That is what I told him (Schalk) then. I know no Mr. Newman. Mr. Bennett is a pretty tall man, with long whiskers. I know Mr. Bennett; I had many a drink with him. I do not know Mr. Stoddard. I do not know Mr. Lillis. I know our beer was bad about the middle of June; I tried all the time to find out the reason. I could find out nothing at all; I looked all
76 over. I didn't have any trouble before the first of June. I used these goods for eight months before; about the latter part of May or first part of June I found out my beer was getting worse every day.

Q. Now, up to the middle of June all the difference you noticed was a little difficulty in the latter part of May or first of June that didn't amount to anything; isn't that so?

A. That didn't amount to much.

Q. That beer you sold?

A. Yes, sir.

Q. And that beer was accepted by your customers and never returned?

A. Not in May and first part of June.

Q. No complaints were ever made about that?

A. Sometimes they commence to make complaints, too, but it didn't amount to nothing. From the first of April to the middle of June we used Gaff, Gent and Thomas' goods. We examined them as we put them into the mash; we didn't have any serious trouble until the middle of June. I found the goods good up to the middle of June. I only used a little of this what we call kreisin, or new beer, with the old beer. The more I used of this new beer the worse my beer got.

Q. This new beer that you used about the middle of June that spoiled the old beer that you had on hand, about what day, as near as you can fix the day, was that brewing commenced?

A. It was made about the first of June; made about May 25th or first of June; something like that. I noticed a little difference in my beer in the latter part of May, and finally it got to be bad.

By Mr. MOULTON:

Q. When was the new beer made which finally made it utterly bad?

A. About the latter part of May; about the 25th or 26th. Usually, as we are brewing our beer, as we are getting it ready to send out to customers, we usually taste it to see if it is going all right. If it was bad I would ascertain it in the taste. I know how my beer tastes before I send it to my customers. I tasted it (this beer), but I had no other to send out. I knew it was bad. I knew our beer was bad before our customers commenced complaining. The latter part of May I found out my beer changed. The difficulty in the latter part of May was slight; we didn't have any complaints about that; still the beer was a little changed. This beer that damaged the old beer that I referred to was made in the latter part

of May; we brew every day in our brewery. We generally got two loads a week, sometimes three loads a week, of cerealine from Gaff, Gent & Thomas; if we got a load on Monday we would have it brewed up before Thursday, and if we got a load on Thursday we would have it brewed up before the next Monday. Our beer had been all right up to the 25th of May. We had used Gaff, Gent & Thomas' goods in brewing right along up to that time. We had used up all the goods that we had bought between the 3d of
77 April and the 25th of May, and we were buying more goods to use. We examined these goods before we put them in on the 25th of May, and we didn't discover any difficulty. The cerealine had a little different color; didn't look quite as white; could see a little speck in the corn once and awhile. I had not always seen these black specks in the grain.

Q. You didn't see any black spots between the first of April and the 25th of May, until you made that brewing?

A. Yes; then it about commenced, or a few days later. By examining the beer after it is brewed you cannot tell what made it bad, if it is bad.

Q. In this beer that you manufactured on the 25th of May did you also use malt and hops?

A. Yes; latter part of it.

—. How long had Mr. Kiefer been in the brewing business? Do you know that?

A. I am fourteen years in this country, and ever since he is in that business. I am a foreman nine years. I am nine years in that brewery as foreman. I have been with the Greenway Brewing Company, Syracuse, New York, since I left Mr. Kiefer. I went from here to Syracuse to work there, and I am there yet. We sometimes call the young beer kreisin; the old beer we call stock lager.

Q. I want to know if that is what you mentioned as kreisin in the young beer.

A. Yes, sir. The young beer or kreisin is manufactured from hops and malt and cerealine. We use two-thirds malt and one-third cerealine—from one-quarter to one-third cerealine. Old beer is also made out of hops, malt, and part of cerealine. We generally keep the stock beer four or five or six months. Malt will make yeast without cerealine, and cerealine will not make yeast without malt. You cannot make yeast of cerealine without any other ingredients at all; you have got to have malt with it, and when we talk about malt we mean barley malt. Hops are used for the purpose of flavoring the beer. You have got to have hops to make beer bitter.

Q. Is that all?

A. The hops got to help clear the beer.

By Mr. MOULTON:

Q. Do hops do anything else besides make the beer bitter?

A. No, sir; by fermenting the beer it has got to help with it.

Q. The hops help to ferment the beer?

A. Yes, sir; it has got to be fermented. I know what yeast is;

it is some flour and mixed with something—just like the baker mixes his bread, but it don't look quite so white; sometimes it looks so white, but not all the time. That is the best explanation that I can give in English. I was the brewer in that cellar, present personally all the time. We have a Reaumur thermometer in every cellar, and the temperature was kept at four or five degrees—
78 it was five degrees, say. It sometimes went as high as six and a half. It didn't keep six and a half twenty-four hours. The ice machine was never stopped working. We put ice in every day. Cerealine is made of white corn starch and made out of white corn, starch, and sugar. I can't tell you exactly how much sugar there is in it; I don't know. I have been a brewer nine years. During the process of manufacture the starch is turned into sugar. It is turned into sugar in the mashing vat; then it is run off in that form. The test by which we tell if it is all turned into sugar or not is the saccharonometer; also after I get my kettle I try my beer; you can see by the beer; you can find out by the scale.

Q. If there be any starch will the starch all turn in the solution in the mash tub without further trouble?

A. No, sir;

Q. Then how can you tell whether the starch is all out and the flour is all converted into sugar?

A. I tries my beer by scale, by saccharonometer. I can tell by looking at the grain. I can tell by nothing else besides looking at the grain and the saccharonometer.

Q. Supposing the starch is not all converted into sugar, you convert the starch into sugar by a certain heat, don't you?

A. Yes; if some of the starch goes into the beer before we get sugar the beer will not come clear, but for that matter we will boil it before we ferment it. We boil the beer, and after it is boiled so long the beer got to get clear. The beer wants to be fined in kettles. The yeast is formed in the mash tub. The yeast comes on the bottom of the lager beer; then we draw off the fluid and leave the yeast there and it forms a nucleus for a new drawing; that yeast looks something like soft soap or mush. We take it out every time and clean the tub and put it in little tubs, and as soon as we get this brewing done we use this for the next. The tubs are cleaned with water and brush. About 14 degrees Reaumur would be about 60 Fahrenheit. I have made the test myself. I don't know what albumen is.

79 Q. Do you know anything about the term at all?

A. If you tell me in German.

Q. You know what that is, do you?

A. Yes, sir.

Q. Is that found in the yeast?

A. No; it first makes its appearance in the fermenting tub.

Q. What becomes of it?

A. It has got to be through the fermenting tub. It has got to get out in the beer to make the yeast. It makes the yeast. It is in the yeast, and the yeast is a growing plant; that is what is yeast—

albumen. If we were to raise the temperature of the beer one degree Reaumur it wouldn't have any effect at all, because it can't be kept up; if it were to go up six degrees in 24 hours it wouldn't affect the beer at all; it wouldn't affect it if it got up to seven degrees; might affect it if it gets up as high as eight degrees. I know when the starch is converted into sugar. I don't know what diastase is. The temperature in the cellar during this time runs from four and one-half to six. I know what dextrime is; it is right in the beer. In fermenting the dextrime has got something to do with the fermenting; dextrine has to help build the yeast or make the yeast also. To fine the beer we used isinglass, beech, and birch shavings and new leather; if the shavings were unclean that would spoil the beer; it would get a different color and smell bad; when our yeast gets a little bad we go and change; get some yeast somewhere else, from some other brewer. Out of forty barrels I generally get as much as four quarts of yeast; if there is anything the matter with the yeast and we do not help it the yeast will die. We purify the yeast by washing it; if that was not promptly done the beer wouldn't work as soon as it ought to; it takes longer time to clear; it wouldn't spoil the beer. If the yeast is bad we can't use it at all; it will spoil the beer; you have got to keep the yeast cold; if it is heated too hot you won't
80 have any yeast any more. In spite of all we can do always yeast carries into the young beer, and there is generally some left in the stock beer; can't make any beer without yeast. Hops and malt and cerealine make the yeast. After the 3d of July, if I am not mistaken, we got yeast from Hughes' brewery; I sent the driver for it. It is over two years, and I can't remember exactly where we got it. As soon as I didn't use the cerealine any more I got yeast. I found lumps in that load I got on the 3d of July and I never used cerealine after that. I threw the old yeast away; I told the man to do it, and saw him do it, too. You can use yeast five or six times sometimes; you can use it five or six months from one tub into another, when it keeps all right; I done it often. I did not use this yeast six months prior to throwing it away, but you can do it. I changed my yeast two or three months before the 3d of July. I seen in the paper that there was a fire in that house in October, 1884. I ain't been there; I don't know anything about the beer that was there at that time.

Q. Did you detect in running off this mash in the fermenting tub or in any of these processes, through the kettle or through the mash tub to the kettle, or any of those places—did you examine to see whether there was any odor connected with it at all?

A. I did; yes; from the mash right in the kettle. I couldn't smell anything. If I could tell I wouldn't mix it with my beer. I could tell by simply smelling, without any difficulty. I didn't detect anything wrong that I had put in the stock beer during this time in the smell. It was my business to know whether there was anything wrong with it or not. If there was anything wrong I detected it in the smell. If I did detect it I wouldn't use it. When I mixed the young beer with the stock beer I couldn't get the beer

clear any more. I leave it two or three weeks and couldn't get the beer clear any more. I leave it two or three weeks and couldn't get it clear. So long as I left it in that kreisin cask it got a kind
81 of queer taste and I couldn't tell what it came from. Mr. Kiefer and myself had a row and I left him. We had trouble because I couldn't get the beer clear. He wanted me to take the young taste away from it and I couldn't do that, of course. It had a young taste and he wanted me to take the young taste from it. The difficulty that we had was about the making of the beer. I left because I couldn't get that beer old enough in time. In one week I couldn't get beer a year old.

On redirect by plaintiff's counsel he testified:

I am a German by birth, and was thirty-three years old in July. I don't speak the English language and I don't understand it very well. I am not a chemist, and, in English, I don't understand chemical terms when they are spoken to me—that is, very little—and I cannot express myself well in English. I have been engaged in a brewery for nineteen years. I went from Kiefer's to Syracuse. I am a brewer there; foreman; have the same position there that I had at Kiefer's. We sell as much as fourteen or fifteen thousand barrels of lager, besides ale. I have made good beer there; have had no trouble with the beer, and for six years before this bad beer at Kiefer's I had no bad beer. I always succeeded in making good beer. I did not tell Mr. Schalk the beer was injured by reason of the ice machine getting out of order. Mr. Schalk is the son of the brewer in Newark; his father used to have a brewery in Newark; I didn't know him before. After I left Kiefer's place I knew Schalk was an agent of the defendants. I saw Schalk after I left Kiefer's; he was then in the employ of the defendants, at No. 1 Front street. Schalk came to see me at Syracuse, and he talked to me about this matter at No. 1 Front street. He had a paper made out and wanted me to sign it, but I wouldn't do so, because it was not the truth, and I told him so.

Q. When did you tell him that the paper wasn't true and in what respect?

82 (Objected to; objection overruled; defendants except.)

—. He wanted me to swear that I should say that the cellars went up so high and nothing was wrong with the cerealine—that is, that the temperature in the cellars went up so high. I said, I can't do it; there is no such thing. He said that if I would do it he would give me a position and see me all right besides. I wouldn't go into that. I said "I can't sign my name to any such a paper as this." I went over to the office with him and he showed me the paper. He said he would get me a position in a brewery and see me all right about some cash. 'He didn't say how much cash. At No. 1 Front street they had an office upstairs; just one stairs high. I had been there before. I met Mr. Bennett there, the manager of this company; I had seen him there twice. The day that I saw Schalk, Bennett was there. They both spoke to me and I answered them both. Bennett was

present when I was asked to sign this paper. He was in hearing distance. He must have heard Schalk's offer to me, because he was sitting there and could hear it. He took part in the conversation. Bennett said he would see me all right if I would sign that paper. I said, "I ain't going to sign my name; I can't do it." This cerealine as it came to the brewery came in bags and there was a name on the bags—a big round sign on it with the name of the company where it comes from. It had a "diamond C" on it.

Counsel for defendants admits that diamond C means a prime article.

We used ice every day in our cellars in addition to the ice machine.

Q. Do you know whether at any time during that summer the temperature in your cellar got so high as to injure your beer?

(Objected to; objection sustained; plaintiff excepts.)

83 On the recross-examination of witness (by counsel for defendants) he testified:

Q. About this conversation that you had with Mr. Schalk in Bennett's presence. You say that Mr. Schalk came over to your house?

A. Yes, sir; he was there three times, and he got me to come to Bennett's office; that was either the last day in July or the first week in August; that was the same year that me and Mr. Kiefer severed our connection. I was living in Brooklyn at the time Schalk saw me, when I was working in Syracuse. I was living in Syracuse, too. Schalk fetched me a subpœna once.

Q. Isn't it a fact that in answer to that subpœna you went down to Mr. Bennett's office?

A. Yes, sir; after I was sitting in the court at two o'clock I went to Mr. Bennett's office and demanded my return fare, and nobody would give it to me. There was some men there who directed me to some hotel, so I say I didn't have any time to wait. I didn't see Mr. Schalk at that time, nor Mr. Bennett.

ARCHIBALD SCOTT, being duly sworn and examined as a witness for the plaintiff, testifies:

Q. What is your business?

A. Ice dealer, and I was an ice dealer in 1883. I sold ice to Mr. Kiefer during the warm weather; in the month of April, 1883, $169.93 worth. (The witness is handed some bills.) The month of May, 1883, he had 194,200 pounds. In June he had 112 tons 850 pounds. In July he had 212 tons 250 pounds.

By counsel for defendants:

Q. Just tell us what it was in April, if you please.

A. I haven't got the April bill here, but the amount I got, $169.93.

By counsel for plaintiff:

Q. About how much per ton?

A. $1.75 per ton was the charge. That was about 75 tons for April, 100 tons for May, 112 tons for June, 212 tons for July, and in August 173 tons 650 pounds. This ice was delivered at Mr. Kiefer's place of business, in Scholes street, at his brewery. We understood that the ice was to help out the machine; Mr. Kiefer bought the ice and paid for it.

84 On the cross-examination (by counsel for defendants) he testified:

Q. That is all you know about it?

A. Yes, sir; I don't know what become of the beer. I know Mr. Kiefer had an ice machine; he did not say anything to me about the condition of it when he bought these goods; I knew nothing about the ice machine; I was under the impression and heard that the ice was to help the ice machine. The principal part of our ice was taken from the Hudson river; our ice is the purest quality; he gets the best. The ice that we sell to breweries is the same as for other purposes.

FREDERICK LICHT, recalled, and on further cross-examination (by counsel for defendants) he testified:

Q. I think I understood you to tell the jury, when you were on the stand the other day, that you didn't know anything about this case until October, 1883, this case of Kiefer against Gaff, Gent and Thomas; do you remember whether you told me that or not?

A. I think I did, but I think I didn't know anything about it until that time; I have not helped to promote this case nor to bring it; when Mr. Kiefer asked me to come to his office I did. I did not make affidavits to help this case; I made an affidavit in Mr. Towns' office; that was after the suit was commenced, I believe. Some time after the suit was commenced I called down to Mr. Towns' office and he wanted to know what I knew about it.

Q. How long was that with reference to your trip to Columbus, Indiana?

A. That was a good while. I couldn't say; it might have been six weeks, and might have been more. Mr. Kiefer came and saw me and wanted to know if I was selling those goods; I told him no, and he wanted to know what was the matter with them, and I told him just what was the matter. Then he wanted me to come down to his counsel and make an affidavit to that effect, and I did. I gave Mr. Kiefer no advice; I made only an affidavit. (Handing witness an ear of corn.) I don't know what makes that corn shrink at the ends; if you will tell me where it comes from I will tell you what ails it; if it is sweet corn it all shrinks that way. It is white corn.

85 I can't tell what ails corn unless I know where it grows. White corn is different from Indiana corn or Southern corn. I can't tell what caused those shrinkages except I tell where it comes from. If I see them black kernels in it then I may tell. Experts might tell; they know all about the different parts where corn comes from. Corn has a fixed number of rows on a cob, I believe, but the number it has I can't exactly tell you; I have heard already over and over, and

have seen it over and over, but I haven't fixed my mind to it. I told you that after I got the report from Buffalo or from Newark that I examined the cerealine and found several spots in it. I found out the black spots were from rotten kernels on the cob which went in which I took down there at the mills. I examined the same cerealine in New York, and goods that came back from pier 4 in the office. Those black spots come from rotten kernels which had formed in the ear of the corn before the cerealine was made. I have seen cerealine made down in their mill. They showed me what they were doing. I seen it run, the corn grits. They steamed them through a conveyor that runs down, and that is the way they showed me how they made it. I did not see a fan mill or winnowing mill there. (Showing witness sample.) This is some of the corn that I saw there. I went to the mills the evening I got there, before I saw Mr. Thomas. I got out my patent about eight or nine months after that, after I was down there.

Q. When did you make the first application for it?

By the COURT: How is that material?

Q. Had you made an application for the patent when you went to Columbus, Indiana?

A. No, sir; I hadn't filed any paper. I made my first application some time after; I don't know exactly the month or time. A year afterwards I sought to put my goods on the market—several months. I didn't keep a record of it exactly.

EDWARD M. LICHT, being duly sworn and examined as a witness for the plaintiff, testified:

Q. Do you know the defendants, Gaff, Gent & Thomas?

A. Yes, sir.

Q. Were you connected with them in any way in business in 1883?

A. Yes, sir; I was working for father, and he was. That connection brought me in connection with the manager of the firm in New York nearly every day. His name was O. O. Bennett. He reported himself to be the general manager. He had his name on the billheads.

86 Counsel for defendants admits that O. O. Bennett was their agent and general manager in New York city.

Witness continued: I used to be around about the warehouse where this cerealine was stored in May and June. Most of the cerealine the defendants had for sale during the months of May, June, and July was bad; hot; it was damaged; some mouldy. Half a dozen parties returned it—half a dozen brewers. I don't believe the defendants had it inspected in May and June.

By counsel for defendants:

Q. Do you know?

A. I can't say positively.

By counsel for plaintiff:

Q. State what you know about it.

A. Soon as I found out the goods were getting bad I had it inspected. I wouldn't take any without it was inspected. I went down to pier No. 4 and called in an inspector and had them inspect it. The result of those goods that I had inspected was eight to nine out of ten bad. I wasn't present. Eight to nine out of ten bags was bad bags; hot; so hot that it would burn you. That fact was reported to Bennett. I went there and told him what I got out of the lot, and what was bad; this was at pier No. 4, North River. That was the place where these goods were landed from the West; I believe it was. I believe they used pier 2, but I never went there. I generally went to pier 4. They had a lot of these damaged goods stored in 43 Water street, in J. D. Green's store. They had them there sifting the goods and breaking the lumps. It was lumpy, and some was mouldy and some was not, but it was a little off color. They run it through the sieves, and the sieves separated it, and they sewed the bags up again. They put in bags marked diamond C. They had it on the floor and spread it out, and by spreading it out it would take part of the smell off; then, after sifting it, they would pick out the lumps; then, after they sifted it, they put it in bags marked diamond C and sewed up the bags. Some of these goods that were inspected and condemned were sent to brewers. The goods that I found good I sent to my customers. Even those
87 were sent back. After one week I went to Newark, to a firm there, and I had them all inspected and sent them there, and when I got there they were hot, and they were good when I sent them. I had picked them out of this lot—out of the nine out of ten. The inspector who inspected that lot is in court; it was Mr. Fitzpatrick. After this stuff had gone through this process it would be impossible for a person not acquainted with it to detect that anything was the matter with it. It was a little off color, but they wouldn't know the difference. I got half a dozen customers that sent them back. I first discovered that these goods were getting bad about June 2d. Up to that time I had been dealing with my father, from November, 1882, up to June 2d, 1883. The goods had proved very fine up to that time, and after that nine out of ten that came was bad, and that percentage which seemed to be good was sent back in every instance. There seemed to be over two hundred bags that had been sent round to 43 Water street to be sifted—I saw myself—stored right in the place. I couldn't say that there were as many at one time as eighteen hundred. Mr. Bennett was told on the second of June that these goods were damaged; that it wasn't fit for brewers' use. He kept sending them after that. I know Mr. Kiefer was a customer of Mr. Bennett's. He was a customer after the second of June, and goods were sent to him after the second of June.

On cross-examination (by counsel for defendants) he testified:

Q. You know that goods were shipped to Kiefer after the second of June?

A. Yes, sir; because I got the commissions out of it. We were using these goods along in January and March, 1883, and they were fine goods then. As far as I know there was nothing the matter with them; as good goods as I ever saw. I couldn't say positive without looking over my books if they were good in April. I think they were good the first of April. There was one lot—a car-load—sent back; I think that was in April; but they explained to me that it was damaged by there being a leak in the car. I think they were perfectly good in January. About the first of June we discovered that something was the matter with them. I took the goods up in my hands and examined the condition of them all. I found they were slightly off color. You couldn't hardly tell without you was acquainted with it; but being acquainted with the
88 goods you could tell. I don't know anything about the corn being frost-bitten. Here and there were black specks in the corn. I don't know what was done with any of those goods that was sifted up there at 43 Water street. I don't know where Mr. Kiefer's goods were shipped from. I don't know for what purpose Kiefer bought these goods from me. I don't believe I got any commission after June and July. I didn't sell any of these goods that I inspected on pier 4, North River, to Mr. Kiefer. All I shipped and had inspected was my own trade that I hadn't turned off to Gaff, Gent, and Thomas, outside of the commission. I bought these goods of defendants myself through father, and sold them myself. I was father's agent, and they became my goods after I bought them.

Q. You kept them and sold them to your customers and didn't get any commission from them?

A. No, sir.

JOHN ABRAHAMS, being duly sworn and examined as a witness for the plaintiff, testifies:

Q. For whom did you work in 1883, during the months of June and the latter part of May?

A. John D. Green, and I worked for him in July. I sifted cerealine during that time; I sifted it at 43 Water street; when I sifted it I put it into C bags. I don't know whether the name of Gaff, Gent and Thomas was on it. They are marked diamond C bags. I saw brewers' wagons coming there to get that stuff. I never took no notice of Mr. Kiefer's wagons. I don't know the names of the wagons. We sifted all we had in there, pretty near; about a thousand and more bags, I guess. It was in the spring of the year. The bags were hard and looks to me to be all damp, and was warm. It was spread out on the floor to cool off before we had sifted and after we had sifted; sifting it took the lumps out.

Q. Then did it look like this (showing witness sample cerealine)?

A. Browner, a little darker colored. It was in flakes and bunches like this. The bunches were all sifted out, so that it was in separate pieces like this. Most of it was put back in the same bags in which it came.

On cross-examination (by counsel for defendants) he testified:

Q. Do you know what Gaff, Gent & Thomas sold those goods for?

A. No.

89 JOHN VEIDT, being duly sworn and examined as a witness for the plaintiff, testifies:

Q. How old are you?

A. Twenty-two. I worked for Mr. Kiefer in 1883. I was driver of his wagon. I have been to No. 1 Front street.

Q. Did anybody, when you went to No. 1 Front street during the month of June, send you to No. 43 Water street?

A. Yes, sir.

Counsel for the defendants admit that he got these goods from Mr. Green's warehouse.

I also got goods from pier 4 and pier 1, North River. I got goods there in the month of June. I got goods the from 41 Water street. I got several loads from pier 4; I couldn't tell in what month; it was between June and July. I remember the time the last load was brought to Mr. Kiefer's place, when we discovered it was lumpy. I got the last load; got it from 43 Water street.

No cross-examination.

THOMAS FITZPATRICK, being duly sworn and examined as witness for the plaintiff, testifies:

Q. What was your business in 1883?

A. Flour inspector. In the month of June I inspected goods marked diamond C from Gaff, Gent and Thomas; they were cerealine and corn meal; made that inspection on pier 4, North river; about sixty-five per cent. were damaged; that was just when they came from the car. I examined several lots during the month of June. The first lot I done that young gentleman that was on the stand here asked me to go and inspect for him. I have no idea what time that was. We kept memoranda, but they are destroyed now, because our business has changed from what it was then. I examined them for Mr. Licht. That was the first lot I examined. As a general thing, we examined the whole of it for O. O. Bennett. He is the man that paid for the inspection. I knew what his business was at that time. We inspected for Mr. Bennett any time he asked us. That certain article we inspected about June, July, or August. About that time and afterwards, of course, other goods that he has we inspected them right along without any question—that is, cerealine. That is the goods we found damaged; about sixty-five per cent. for each car.

90 On the cross-examination (by counsel for defendants) he testified:

Q. How many cars did you inspect?

A. I inspected two. To the best of my knowledge, I made that

inspection in June. I am an official inspector of the produce exchange. I did not personally make an in-pection for Mr. Bennett anywhere else. I made an inspection for Mr. Bennett at pier 4 about that time and found his goods sound. About this particular time it was bad, and at other times it was good; found the cerealine good up to June or July, and then I examined two car-loads and they were bad. We inspected when we were ordered.

Q. Were you ordered to inspect when you found these two car-loads bad; were you ordered to make any other inspection?

A. Yes, sir; and we found the rest of the goods bad, and for a period of two months after that. Not all, but a certain percentage were bad; it was sour; don't know the number of car-loads I found sour, and I don't remember the number of car-loads I inspected; don't know the number of bags I inspected. I don't know what was done with the bags after I inspected. I examined the cerealine myself with my hand; it looked a little off color. The lumps doesn't amount to anything; saw a few black spots in it; it was very hot. I didn't find it lumpy nor moldy; don't know what Mr. Bennett did with it. I will tell you the reason I can't remember only being two cars is because there was two of us there at the time, and, of course, I would inspect probably while I was there, and then I would go away and the other man would inspect. All I remember doing myself during the whole sixty days was two cars.

By counsel for plaintiff:

Q. When you didn't inspect your partner did?

A. When I didn't inspect my partner was there to inspect, but what he done I don't know.

By counsel for defendants:

Q. Do you mean to say that you only inspected two car-loads, or that you have only a distinct recollection of inspecting two car-loads?

A. That is what I said. I only recollect of inspecting two car-loads of cerealine. Every day I was there I inspected goods—sometimes for Bennett and sometimes for others. I said this was hot and sour; sifting it and spreading it on the floor would have a very fine effect; it would cool it; if it was then kept separate it could not be detected.

91 Q. After it had been sifted and spread out on the floor would that allay the heat so that it could be put into the bags separately and not be detected?

A. Not very likely, unless by a professional.

HENRY KALP, being duly sworn and examined as a witness for the plaintiff, testifies:

Q. What is your name?

A. Henry Kalp; am a brewer; have been so about twenty-five years. I was foreman in America fifteen years. In 1883 I brewed for Mr. Ochs & Lehund in Brooklyn. During the month of June,

1883, I brewed beer from cerealine bought of Gaff, Gent & Thomas; it was bought from O. O. Bennett. I got cerealine that is no good for beer; the beer was sour and moldy; found out in the fermenting-room that the beer was bad; about ten or twelve days.

Q. Why didn't you discover it before ten days? You saw this stuff; how did it look—like that (showing witness sample)?

A. No, sir; it got a little stiff; a little hard. Before I put it in the beer it looked all right. About 550 to 600 barrels of beer was ruined. That beer could not be used for any purpose. I had very much trouble with that beer. I got it mixed up with other beer in the cellars. The beer that I mixed it up with got no good; it ruined it; it got sour.

On the cross-examination (by counsel for defendants) he testified:

Q. Do you know anything about the conditions under which the cerealine used by you on that occasion was bought?

Not answered.

Q. Don't you know that Mr. Ochs knew that about the time he bought these goods, that it was damaged?

A. I told him so. I told him the stuff in the fermenting-room was not good. I seen it not before. I don't know that these goods were sold to Ochs & Lehund as damaged goods and at a reduced price because they were damaged. I don't know whether the balance was returned to Gaff, Gent & Thomas. I used about fourteen hundred pounds; that was not all I had; I got about a load; I used that in the day. I got a load on the brewery wagon. I got a load from O. O. Bennett. I told him I didn't use that stuff, and he told me to send it back, and then I sent it back. I don't know what Mr. Bennett did with it.

On the foregoing testimony counsel for plaintiff rested.

92 Thereupon counsel for defendants moved to take the case from the jury and dismiss the action, on the ground that the evidence does not sustain the cause of action.

Motion was denied.

To which ruling counsel for the defendants duly excepted.

Counsel for the defendants then opened the case for the defendants and called—

RICHARD THOMAS, one of the defendants, who, being duly sworn and examined, testified:

Q. Where do you live?

A. I live at Columbus, Indiana; am one of the defendants in this action and a member of the firm of Graff, Gent & Thomas; was at Columbus, Indiana, in July, 1883. I manage generally the purchase of the corn. I buy nearly all the corn that is bought. When I am at home I buy it all. In April, May, June, and July, 1883, we bought the choicest white corn in the market. I inspected that corn myself at the time it was bought. When it is delivered to us in wagons it is inspected in the wagons. When it is delivered in cars we send to that car for a sample taken from it—say, perhaps,

a gallon, and it is brought to our office and inspected. That sample is brought from the car with what is known as a sampler—that is, a hollow tube—and you can draw out a handful or a pint, say, at a time. It is inserted in the car and drawn from a section from the car, and when it comes to our office we examine it. Either myself or my partner examined every car-load that was bought between the first day of January, 1883, and the third day of July, 1883. The corn that we bought during these periods was good, choice white corn. It was shelled corn, of course. To make cerealine the corn is taken to the mill and elevated, passing through a large cylindrical corn-cleaner, and then carried off.

93 Q. Do you know whether or not Mr. Licht was discharged by your firm?

Counsel for plaintiff objects. The witness must state what he knows.

WITNESS: I know he was. I saw Mr. Licht out at our mill in the summer of 1883; it was the latter part of June. He came to my office. I have heard read his evidence. I don't remember any particular conversation he had with me there at that time. He came there much to my surprise, because one of the members of our firm was in New York at that time. I don't remember definitely any conversation any further than this, that he made some complaint about the corn. I don't remember him asking me anything about the damaged goods or anything of that kind, but he may have asked me. I think he made some complaint about the corn, and I told him that we bought the best corn we could get in the market; we always did that. Nothing was said about frost-bitten corn; that we always made it our business to buy, the best corn; we didn't take any chances on our corn; we bought the best corn because our business demanded that we should do so. We were putting our goods on the market for food and for brewers' use; that is what I said to him, that we bought the very best corn always—the very best corn. No frost-bitten corn was ever bought or used in our mill during that period to make cerealine. I never at any time said to Mr. Licht that I knew our corn was frost-bitten, and I did not say that I could not help it. I was buying the best corn that the country produced, at that time, and it was the best I could do. I said nothing to that effect. The idea that I intended to convey to Mr. Licht, and that I did convey to him, and that I did say, was that we had the best corn.

I told him we always bought the best corn on the market. That is our business, to buy the best corn. It is bought under inspection wherever we go. We buy principally in Peoria, besides that raised in our own county and immediate vicinity.

Q. What corn is that (showing sample)?

A. That is white corn; that is called the Armstrong white corn; that is grown all through our section; that is like the general character of the corn we bought in 1883. We never bought any frost-bitten corn.

Q. What do you know about the quality of the corn that goes into your mill, about this time, of your own knowledge?

A. I know it is first class. At no time did frost-bitten corn go into our mill for the purpose of manufacturing cerealine.

94 Q. Did you see it? Do you know that it did?

A. I inspected the corn myself. No corn went into that mill that was bad.

Q. Did Mr. Licht at the time he had the interview with you in your office, in the month of June, 1883, say to you words as follows: "What in the world is the matter with your goods. There is a terrible sight of complaint, and our goods — sent back from all the customers I sold to." Did he say such a thing as that?

A. No, sir; he did not, and I did not at that time or any other time reply, "Well, Mr. Licht, we can do no better. Our corn in this section of the country is all frost-bitten. It is the best we can do. We can do no better. It all got frost-bitten, and we can't get no better corn here to make it."

Q. Then did he say, "You better not make any goods. I would just as lief sell a baker flour with arsenic or poison to make bread as to sell a brewer that to make beer with." Did he say that?

A. No; he never said any such thing. I did not reply, "It is the best we can do. We can do no better. We can't get any better corn in this section of the country." What I did say was, We always buy the best of corn. That evidence of Mr. Licht's is wholly untrue, emphatically. During this period in 1883 we manufactured about fifteen car-loads a week of cerealine, and each car-load contained about fourteen tons—twenty-eight thousand pounds; about that. Of that eleven thousand tons of cerealine in 1883 I don't think there was any returned to us as being damaged prior to—well, you might say June and July. I don't think there was any returned to us prior to that time. The percentage that was injured was very light indeed. Of course, I haven't the data. Before that time—before July and June, 1883—I don't remember that we had any difficulty with any cerealine. I don't think we had. We had goods returned, of course, during June and July. I can't tell exactly how much. I have no recollection of any goods being returned to us before

95 these goods were damaged here in New York. I can't tell how much, but it was very slight. That was in the month of June. I know the amount damaged in New York in June and July, 1883, was within a thousand bags. I know it didn't exceed a thousand bags.

Q. Did you see those goods?

A. I didn't see those goods; no, sir.

Q. What condition were those goods in after their manufacture, in all cases when they left your mill in Indiana?

A. In perfect condition.

Q. Were they in the condition that this is (showing witness sample)?

A. Yes, sir; they were packed in sacks and shipped in cars with the bags sewed up, and marked diamond C. That is the way we mark our sacks. Our shipping clerk inspected those goods when

they left our mill. He is under instructions. Under general instructions they were shipped. They were shipped to O. O. Bennett, in New York. He was our agent in New York for the sale of these goods and accounting for them. They were landed at pier 4; never directed any goods to be landed at pier 2 or pier 1. I have handled those goods personally myself so as to be acquainted with their qualities. When the cerealine comes in contact with water, leaky cars, or where they might be packed too closely in store, a large amount together, where they wouldn't have a sufficient amount of air to work through, or they might be heated, it might be injured. The heat forms lumps in the bags. It also discolors it, and also sours it and it gets musty. Mr. Green was our warehouseman. I heard the testimony that there was some sifting took place at his place. When we settled with Ochs & Lehund those goods that we sold them were sent back. They were billed to them as damaged goods.

Q. They were sold to them as damaged goods?

A. Yes, sir.

Counsel for plaintiff objects to the question, "Were they sold to him as damaged goods," on the ground that the witness, not having made the sale, is incompetent to testify how they were sold. (Objection overruled; plaintiff excepts.)

96 Q. What became of that cerealine you sold to Ochs & Lehund?

A. I don't know anything about it. We took it back from them. I know, Mr. Moulton, that we took it back, but they don't allow me to state anything without I was there. Yes; we took it back; we took it back by negotiation with Messrs. Ochs & Lehund, and that matter was then settled afterwards. I called on the plaintiff in the summer of 1883 at his place of business, in Brooklyn, at his brewery; Mr. Schalk was with me. Mr. Licht is not now in our employ. I called on plaintiff, as I told him, simply to see the man who had sued us for thirty-two thousand dollars; I wanted to look at him, that is all. I said to him, "I think there is nothing in it; why don't you withdraw it and drop it?" that is all. He made some indefinite reply, that he had lost his beer, or something of that kind, and I think maybe he said we had ruined him; I think he did say that. It was a good-natured conversation. We took three or four glasses of beer and I paid for them all. That was all that occurred then.

On cross-examination by counsel for plaintiff he testified:

Q. Your part of the business was in Indiana, Mr. Thomas?

A. Yes; that is where our mills are—where our principal business is. I presume I was at Columbus in the spring and summer of 1883. I don't think I was in New York in April, May, June, or July, 1883. I personally took no part in the sale of this cerealine to Ochs & Lehund. I heard of the sale before the cerealine was complained of. That sale was made at our office. None of the entries in that book that I have been looking at are in my handwriting.

There may be some transactions in that book that I personally made; there might not be. I wasn't making personal transactions here; we had some one else for that business. We buy a great deal of our corn in Peoria, Illinois; we also buy at Decatur, and I., B. and W. railroad, through that section some, St. Louis, and we have bought it in Chicago; very little, though; haven't bought it more than fifty or sixty miles in Indiana. Peoria is an extensive corn market—very large; corn comes there from many parts of the West for sale. Peoria is about two hundred miles from our place. We don't go to Peoria every time to buy our corn; we generally buy it by telegraph, and all the corn is graded in Peoria. We first
97 see the corn when it comes into Columbus, when it is reported to us as having arrived, and then we first see the sample of it. That is after we buy it and it has been shipped to us; but it is bought with an understanding as to what it shall be. When Licht came to me he said something—I don't know exactly what he said. He said something about the corn not being good; that there was a general complaint that it wasn't good. I don't remember what reason he assigned for it. I didn't ask him why it wasn't good—not that I remember.

Q. He told you that your corn was bad?

A. He said something of that kind; yes. He also said he was going to Terre Haute. He didn't profess to have any other business with us at that time; he didn't have any business with me; we had no business with him. He didn't tell me he had come to see about it. He said the corn was bad. It was none of his business, because we are manufacturing grain. We buy it in good condition. He was here in New York. Our partner was here. If he wanted to make any complaint he could have lodged it with him. I don't consider that it was any of his business what we were doing out there. He was selling our product to a very limited extent; he was selling it a little, and had been selling it since the previous November. I don't consider that it was any of his business whether the corn was good or bad, because the corn was good; that is the simple fact of the matter. I never felt any faith in that man, not a particle. I would cut my conversation with him just as short as I could.

Q. Was the reason why you didn't ask him wherein or in what particular your corn was bad because you had no faith in the man?

A. I can't tell what the reason is now. I had no faith in the man; I can't tell, not a particle. He didn't specify wherein it was bad; nothing was said about the corn being frost-bitten. Our corn was not frost-bitten in 1882.

Q. Do you mean to say there wasn't a heavy frost early in September, 1882, that struck all the corn of the West, in Indiana, Illinois, and Iowa?

A. I do; I mean to say it didn't strike us. We generally have frost in October. I don't know that we had had an exceedingly early frost in 1882.

Q. You have forgotten it?

A. I don't know; I say I have forgotten it. I won't say there

98 was not and I won't say there was. Bennett is not in prison; he has got out. Our process takes the germ out of the corn. There is the germ on the apex of the grain; I mean this soft, oily part, the whole of it; it takes the most of it out. The hominy mill takes out the germ; that is the object of it.

Q. (Handing witness specimens.) Do you think it is taken out of that kernel, for instance, that I show you?

A. There may be a particle of it there, but that would come out when it goes to the mill stone.

Q. I am talking about the hominy mill now. Did it take it out of that one, do you think?

A. Well, it didn't take it out of that one—all of it.

Q. Will you pick out a split kernel there—that is, one-half of an entire kernel—and show us one where the germ is taken out—will you?

A. It is taken out all through here.

Q. Show us one that is taken out.

A. There is one with the germ taken out; it may break a grain in two. It does it. The germ is all taken out before it cuts into grits.

Q. (Handing witness a paper.) Is that your advertisement that I show you now?

A. Yes, sir; we issued that.

(The advertisement in the Brewers' Journal is marked for identification A.)

A. We have been publishing that advertisement for one or two years. I think it was in 1882 that Professor Doremus gave us the analysis. There has been no change in the analysis since then. I went to see Kiefer at his brewery, and I said I wanted to see the man that had sued me for $30,000, in a jocular way. I went there to see him. The conversation was very slight. I told him I thought he ought to withdraw the suit. It was too simple for anything; too absurd. I don't remember having said anything else. That is all I went for. I was going to remark that in this process of making cerealine, in conveying these grits from which the cerealine is made, I omitted to state that it sometimes passes through a cylinder in which there is a little steam conveyed. The corn gets so hard—it is as hard as diamonds sometimes—and in passing through the rollers when it is so hard it crushes in the flour too much and we subject it to just a slight steaming, the very slightest, not sufficient to make it hot, but so as to moisten and soften it so to make the flakes larger.

By the COURT:

Q. To change the form of it only from the irregular grains in sheets—to flake it?

A. That is all.

99 Q. There is no chemical change or treatment; you only change the form of it from being kernels to sheets?

A. That is all.

By counsel for plaintiff:

Q. Do you always steam it?

A. Not always; no sir. In the early part of the season the corn is usually softer—that is, in July. We steam it sometimes in June and July. Sometimes we begin as early as April, and I don't know but what the application is sometimes made earlier than that. The tendency of steam is to dampen, but the friction of the rollers dries it, and then it is subjected to a hot-air blast.

RICHARD THOMAS was recalled on behalf of the defendants, and he testified as follows:

Q. I want to know that if at the time you have been testifying about, in the summer of 1883, or about that time, before or after, there was any unripe or any immature corn used in making cerealine, or any corn that had been unripe or dried; was there anything of that kind used?

A. No; nothing. I know it. I know there was not. I know it by inspection of the grain.

Q. Was there anything of that kind used?

A. No, sir.

JOHN D. GREEN, being duly sworn and examined as a witness for the defendants, testifies:

Q. What is your business?

A. Cooper. I am also a warehouseman. My warehouse is located at 37 Water street; have been employed for storage by Gaff, Gent & Thomas; acted as warehouseman for them in April and July, 1883; had some of these goods on storage during those months; some at 43 Water street and some at 37, I think; I wouldn't be positive; and also at 15 Water street. I think during that year we had fourteen thousand bags, maybe fifteen thousand, in 43, and about three thousand bags in 15, and about five thousand in 37. Some of these sacks contained heated and damaged cerealine. That was stored at 43 Water street. We sifted those the inspector wouldn't pass through a corn screen with about a quarter of an inch, maybe, mesbes each way; then we spread them out to dry, and then put them in
100 bags again—in new burlap bags that we got for them. I didn't sell them.

Q. What became of them?

A. We got our receipts when they went out; they went to feedmen.

(Objected to.)

Bowen, here in Brooklyn, got some, and Travers, of New York; Mr. Bowen and Mr. Travers are feedmen.

Q. Did any brewer get any of those goods?

A. Might have got a few bags now and then; but they were sent back again.

Counsel for plaintiff moves to strike that out.

Q. Do you know of any brewer having any?

A. I don't know of any brewer—no, sir; but there was different men, such as Leggett (referring to a memorandum), Henry Elias, Leggett, John Kein. Now and then they got hold of a bag that wasn't good and returned it; that is all.

By counsel for plaintiff:

Q. Isn't Kiefer's name there?

A. This is 43 Water street; he has got some meal out of there; I remember goods being delivered from 37 or 15 Water street to Mr. Kiefer's wagons—cerealine. (Referring to paper:) No cerealine that was stored in 43 Water street during that period was delivered to Mr. Kiefer's wagons. I am speaking from my own knowledge; I delivered them. On the 16th of May he got out of 43 Water street fifteen bags of meal, and on the 17th of May he got out of 43 Water street fifteen bags of meal again; I had an idea there was fifteen. I said he got fifteen bags there some time ago; I made a mistake; he got no cerealine during this period of time. On April 4th he got from 15 Water street 100 bags diamond C; on the 15th he got 65; on the 17th he got 60—that is, fifteen Water street; on the 23d he got 60; on the 30th he got fifteen bags of meal from pier 4, North River, and on the 30th he got 30 diamond C from 15 Water street; May 2d, from 15 Water, he got 30 diamond C; this was not all from 43 Water; on the 2d, pier 4, North River, 15 meal; on the 7th he got 12 meal and 24 cerealine; on the 10th, 30 cerealine; on the 10th again, pier 4, North River, 15 meal; on the 16th he got 30 diamond C, and on the 16th——

Q. That is cerealine?

A. No, sir; meal is different. On June 4th, pier 4, North River, he got 60 bags of meal, and on the 7th, 60 cerealine; he got the cerealine from 37 Water street on the 7th; on the 14th from 37 —;

60 bags from 15 Water; 60 again from the same place.

101 —. That is, cerealine from 37 Water?

—. Yes, sir; on the 25th; he got 30 on the 25th again; he got 15 and 30 of cerealine from pier 4, North River, and the last he got July 2d, 30 of diamond C and 15 of meal, on pier 4. Diamond C is cerealine.

Q. Where did he get them?

A. Pier 4, North River.

Q. Do you know whether or not every bag of cerealine that was delivered on Mr. Kiefer's wagons from your warehouse was inspected?

A. Yes, sir; it was inspected by the New York board of inspectors of the produce exchange; it was the old board; they have since changed. Sometimes I was and sometimes I wasn't present at the inspection; I wasn't around when the inspectors were there always; I couldn't say that every bag was inspected. I wasn't around every place, of course.

Counsel for plaintiff moves to strike this out.

Court held that he may prove that he gave orders to have them inspected.

Q. Did you order an inspection of those goods?
A. I didn't order it; the house ordered it.

Counsel for plaintiff moves to strike out this answer.
Counsel for defendants consents.

Q. What do you know about the inspection yourself?
A. Well, I know pretty near about that grade of goods; sometimes the inspectors——
Q. What do you know?
A. Those that were in the store—we had orders not to let a bag go out until they were inspected; and they didn't go out; had those orders from O. O. Bennett.
Q. And did you give those orders to the inspectors?
A. Yes, sir; and the inspectors came there for that purpose. I was present at some of these inspections; they found damaged goods when I was present, and they were thrown to one side; the goods that Mr. Kiefer got were passed by the inspectors as sound goods; I know it of my own knowledge. I know about the damaged goods that were sold to Ochs & Lehund; it was on the last,
102 when the inspectors had gone through, and all the goods were taken out, and there were some—well, I wouldn't be positive, but I think it was in the neighborhood of from one thousand to eighteen or nineteen hundred—bags that were damaged; they were stored at 43 Water street. I was going to say I took a sample over to Ochs & Lehund, like one of those yellow sample boxes, and I asked him if he could use that; he looked at it and told me that he could use it; so I came over to the office the next day, and Mr. Gent was there then, and I told Mr. Gent——
Q. Then what did you do?
A. I took him a sample over and he said he could use it. I told him they were damaged; I told him if he could use those goods he could have them at a reduced price, because they were going to be sold to feedmen and he might as well have the advantage; I told him I would send him over ten bags and he needn't pay the firm anything for them if they weren't good, so I sent him the ten bags and he sent for another load or two loads. I sent them over, and some time afterwards I heard there was trouble; he couldn't use the goods; that is all I know about it; he never sent them back to my warehouse.

On cross-examination by counsel for plaintiff he testified as follows:

Q. Did you tell him on that occasion that the only difference between that article and the good cerealine was simply that it was a little off color?
A. Yes, sir; I told him it was not as light as the other; I told him that it was damaged, not sound; told him if he could use it he could have the benefit of it; he did not buy it of myself.
Q. What was the appearance of the meal or cerealine that was condemned?
A. The life is out of it; it is off color and hasn't got that crisp

feeling into it; if it is damaged that way there is lumps into it; the moisture will stick them together and flatten them out and stick them together; never saw a bag of condemned meal without
103 lumps somewhere; if it wasn't from wet it was from heat; all that wasn't lumpy was passed by the inspectors; none of the meal was condemned by the inspectors unless it was lumpy. When it came to that stage you could smell it a trifle, according to what stage of fermenting it was in. About two thousand bags were condemned in 1883, previous to July 2d, for having lumps in them, and they came in my place from time to time and in different cars. Damaged goods we took into the store and sifted it; then we put it in bags; had to spread it on the floor and dry it and air it, so as to sieve it, and we let it lie there over night. The object of spreading it over the floor is because it wouldn't pay to take one bag by one and take it out and sift it and then put it back again. We quite often cut open the bag, take out what is wet—there wouldn't be half a pint, maybe—tie up the balance, and send it out to a brewer.

Q. Was that your custom in 1883?

A. Yes, sir; we always do it; do it now.

Q. When you find a bag wet you take it out, tie it up, and send out the balance; of course, you don't know how long the meal has been wet?

A. Yes, sir.

Q. Do you?

A. Yes, sir.

Q. How are you able to tell?

A. By its being wet.

Q. Is that the only way you can tell?

A. Yes, sir; I can tell by its being wet. If it is wet a week it isn't dry, and after that if it is wet longer than a week if it lies in a dry place it will dry out and leave that round lump where it got wet discolored, dark, and you can take that out and throw it away and the rest is just as good as before that wet spot was in. I did this before June and July, 1883.

Q. And you did it then, did you, too?

A. July, August, I think; then is when we did what the inspector picked out; it was in August or July, around there, that we sifted it; we sifted what they didn't pass. In June and July, 1883, we
104 opened bags, took out the wet part, and tied up the balance and sent it to customers. The inspectors have passed it after that was done. I found this cerealine warm; when it is damaged it heats. I want you to understand I didn't take lumps out of that. When cerealine is damaged it heats, unless it is a fresh wet and you take it out before it is fermented. If cerealine gets wet and remains wet it will ferment, and ferment is heat. I will swear that I saw delivered to Brown out of that store in the neighborhood of one thousand bags of damaged goods. We also delivered some damaged goods to Travers. I am carrying on the business of cooper at No. 37 Water street; I am making a living at it; I am doing about as much business as any of them there, and was doing in 1883. I superintended the cooperage business myself. My cooperage shop is

37 Water street and the warehouse is 43 Water street, the next block. Pier 4 is about five or six minutes' walk from my cooperage shop; pier 1 is nearer.

Q. Were you in the habit of giving personal attention to everything that went on at pier 4 and pier 1 and 43 Water street and your cooperage shop, too?

A. I wasn't in all places at once. I was not running from one to the other all the time. I used to leave home and go over to my cooper shop at seven o'clock. I spent most of my time during the day where I had work to attend to. If I was called to pier 4 I went. I had a man by the name of Hunt in charge of 43; his duties were to help work and help deliver goods; when these goods were in 43 I didn't have 15; I relet it; I did not have it when the goods went in; no one in particular was in charge of the pier. The paper I have been testifying from is—I went round to Gaff, Gent & Thomas and asked them to give me a statement of what Mr. Kiefer got so I could see from the books; I checked it off by that; that paper is not
in my handwriting; it is in the handwriting of that man in
105 Gaff, Gent & Thomas' office. Those damaged goods were
sold to two or three men all in a bunch; Travers & Brown had them; I delivered to Travers; there was also a little lot that I took over to Ochs & Lehund; I think there was another party; I don't remember his name; it wasn't a very large lot he had; they were sold for feed and we delivered them there, and the orders was drawn out that way; that we sent out we put in new burlap bags we got off Bradley & Kurtz. I pretend to say that Kiefer did not get any goods but thirty bags of meal from 43 Water street; I said some cerealine, but I made a mistake; I am testifying from a book; I looked over this afterwards; some of the book is in my handwriting, some of it in others. I was present when the meal from 43 was delivered to Kiefer; I couldn't say who was the driver; there is different ones comes there every day; I can't remember Kiefer's driver; I testify from recollection that it was meal and not cerealine that was delivered to Kiefer.

Q. And not from your books, but as a matter of recollection?

A. Well, I can't recollect; no, sir; we have the orders there and they are posted; that is what we go by; this meal I speak of is cerealine meal, and the difference between that and cerealine is that the meal is fine. I haven't got my books here with me; it is a delivery book, and I haven't got it here with me.

Redirect by defendants' counsel:

By Mr. PHŒBUS:

Q. You say you compared that statement with your books and checked it off and found it correct; it agreed with your books?

A. Yes, sir; what come out of 43 Water street. Mr. Travers and Mr. Bowen had no connection with lager beer breweries. I wouldn't be positive that my receipts showed that they were sold to them for feed, but they were sold without any mark on the bags; there was no diamond C on the bags; they were new bags and had for the purpose of packing those goods in.

106 Dr. ANTON SCHWARZ, being duly sworn and examined as a witness for the defendants, testifies:

Q. What is your business?

A. I am a chemist, consulting brewer, and publishing a brewers' paper. I have been in that business about over twenty years; in this country, seventeen. I have been located in this vicinity seventeen years, during the whole of my residence in this country. I am acquainted with the general conduct and management of a lager beer brewery, and also acquainted with the constituent elements of lager beer. Lager beer consists of alcohol, extract and water, and properly of yeast too; some yeast is in most all lager beer.

Q. Extract of wheat?

A. Extract consists of what we call generally the sugar, albuminoids, dextrine, salts. That is what we say is extracts in the beer.

Q. What are those elements made from?

A. They are made from beer wort, and that is made of malt and any other saccharine matter. The proportion of those elements in lager beer differ. They have got lager beer that contains about three and four per cent. of alcohol and four and five per cent. of extract; and then there is about three and a half per cent. of alcohol and about five and six per cent. of extract. We generally make lager beer out of malt and some other substitute—what we call generally—for malt, and that is corn goods, rice, or any other raw material. Malt is made out of barley. The first step you have to take is to steep the barley, to put the barley in a steeping tank in water and leave it there for about forty-eight to fifty-two hours, sometimes more, until it gets soft; and from there you bring it on the malting floor and let it grow. After it is grown to a certain extent, then stop the growing process by bring the barley to a kiln and make it dry. The heat stops the growing process; and from there we take it to the storage room and deliver it to the brewers; then it is malt. In brewing lager beer we either put in all malt or a certain proportion of raw meal; we put in three-quarters portion of malt and one-quarter portion of cerealine or any other corn goods, or rice, or any other material—any raw material that contains starch.

Q. What is the first thing you do to make your lager?

A. I have to go along and make a mash; to do that I take the water and heat it to a certain degree, and take the raw material and heat that to a certain degree to bring on a conversion of the starch, because malt as well as raw material contains starch;

107 and we have to convert the starch into sugar. We convert the starch into dextrine, and the dextrine into malt. This, in the malting process, is developed into a certain substance called diastase; and that diastase or albuminoid has a power to convert the starch at a certain temperature into dextrine, or into sugar or malt; and we are going on by mashing that at certain temperatures because when we take it too high a temperature the diastase would get killed—wouldn't work—and we wouldn't get no sugar or

dextrine into the beer; so we have got certain temperatures at which to mash.

Mr. TRACY: What has all this to do with this case?

Q. What is the operation of the brewer in order to convert that starch into sugar?

A. To take a certain proportion of malt and take the right temperatures to have that conversion—all the starch converted into sugar and dextrine—he has to have the right temperature. The right temperature to convert the starch into sugar is between 122 and 160 Fah. After that is done the brewer takes off his beer wort; the beer wort consists then of the extract of malt, of dextrine, malts, salts, and albumenoid, which exist in the malt. From these he brings that beer wort into his kettle. In that work, if the brewer hasn't succeeded in dissolving all his starch he will have some starch in his beer wort.

Q. How would that show itself?

A. The beer runs off in a very cloudy condition, and the starch wouldn't ferment at all; it remains always and makes the beer cloudy, and wouldn't be eliminated by any means of refining or any process. The brewer at that stage in his brewing ought to discover the imperfection in his lager beer. They have certain methods by the reaction of which he could detect it; that reagent is iodine; there is nothing else; a microscopic investigation will show it. After the beer wort is in the kettle he puts hops to the beer and boils the beer for two or three hours, more or less. The object of putting the hops in there is to give the beer a certain bitter taste, to work as a tonic; and the tannic acid—there is not much in that—it works by operating on certain elements in the beer wort and precipitates it; afterwards it boils down to a certain degree by the saccharonometer; then he draws the beer off—the hop beer from his kettle—and boils it; some boil it thirteen, fourteen, or fifteen hours, and some only twelve, and from there it has to be cooled down to a very low degree, generally to about 4 or 5 degrees. In order to cool his wort, the brewer takes it to what we call surface coolers—
108 large tanks standing mostly on the tops of the buildings. He has to lower the temperature by giving it access to the cold air; but the brewers know the danger of leaving that beer in, so he only leaves it an hour and a half or two hours; and from there he moves the beer into an artificial cooling apparatus and cools the beer there by means of ice water, or lately by means of a large refrigerating machine with ammonia.

Q. In that beer-cooling apparatus, at what temperature will the beer be affected at that time?

A. It could be affected at any temperature when the air is not pure.

Q. The air must be pure in the first place?

A. It would be affected at any temperature.

Q. How would the beer be affected by the uncleanliness of the cellars?

A. Any way; at any temperature it would be affected—damaged entirely.

Q. What is the maximum and minimum temperature at which beer will remain in good condition during that time after it is in the cellar?

A. Before I put it in the cellar I have to ferment it.

The witness here stated that beer was raised to a boiling heat by being boiled for three or four hours in a kettle; some people have an iron kettle. This is done to concentrate the beer and make it heavier; in other words, it is boiled down; then we put in hops to extract the bitter tonic and impart it to the beer; then by boiling we precipitate certain albuminoids in the beer itself; this is what the brewer calls making beer wort. If the albuminoids were not eliminated they would in a general way produce cloudiness in the beer; if they remain in the beer they become nourishment for the yeast, and also furnish nourishing qualities for the beer itself.

After boiling, the beer is cooled down to a very low temperature. The fermentation may be higher in ale than in beer, and we call it low fermentation in lager beer and high fermentation in ale. The temperature should not exceed 4½ to 5½ degrees Reaumur to cool it down when you bring it to the fermentation process; that is about 41 degrees Fahrenheit.

The cooling process is necessary in making lager beer. If the temperature should be higher than we have given, it would work too fast and the yeast would not be in good condition, and
109 the beer might be salable but not as good; but it would not produce any visible effect at the commencement of this fermentation. After the beer leaves this stage it is conducted into the fermenting tub, which usually contains from 40 to 60 barrels; some fermenting tubs contain 80 barrels of beer. They are situated in what we call the fermenting-room. This fermenting-room is not in the cellar proper, although it is a kind of a cellar, and has got to be kept very cool and contain very pure air. It must be well ventilated and must be kept in strictly good condition, so that the air will be very pure, and clean. The temperature of the room should be kept low, but I do not place so much reliance upon that, since we have cooling appliances in the fermenting-room apart from the temperature in the room itself. This apparatus should be in each and every tub, independent of the temperature in the fermenting room. The temperature should be 4½ to 5 Reaumur. This should be the temperature of the yeast before it is given into the fermenting tub—that is, the beer should be cooled down to that degree when we are making lager beer.

This cooling process is ordinarily carried on before it goes into the fermenting tub, after being brought into a surface cooler, which is situated usually at the top of the building, where there is cool air and a cool draught. It is further cooled down by the medium of ice water surrounding the pipes, and lately we have machines by which the beer is cooled by ammonia. It is taken directly from this cooling process to the fermenting tub.

In the fermenting tub the yeast is given to the beer and fermen-

tation sets in. We call it fermentation because it has to be produced by a ferment, and in lager beer that is beer yeast.

The principal thing to make good, clear beer is good, clear, pure yeast itself. As soon as the brewer has any other substance in his yeast he cannot carry on good fermentation and cannot make good beer. The principal thing in brewing is the yeast. It is so subtle and sensitive a body that the brewer has to take the utmost care. Every little speck contains about 2,500 yeast cells. You can imagine the power yeast has to produce fermentation when a pound of beer yeast contains about twenty-five millions of yeast cells.

110 Q. Will mold spoil the beer?

A. Mold in the yeast will spoil beer, but not mold in the malt.

Q. Will the yeast that is made of cerealine hops spoil the beer or hurt it?

A. No; it will not; as long as the yeast is sound.

Q. Will cerealine hurt the beer when mingled with the malt in the mash tub?

A. It will never spoil beer.

Q. Will cerealine, even if bad cerealine, spoil it?

A. I think not. I don't think bad cerealine will even spoil it. There is no sugar in cerealine. If the mashing process is not carried on in a right way and you gain more starch than is necessary—you should not gain any such starch from malt or cerealine, but by the mashing process sometimes the temperature is not right in the mash tub; this will spoil beer. If seventy-five per cent. of cerealine was lumpy it would only hurt the beer wort, not the beer. It can easily be detected by the smell of the beer wort or by examination of malt itself. These lumps if taken out the remainder couldn't hurt the beer itself. Taking the process in the fermenting tub, in the vatting process, when I gain too much starch in my beer, so that the starch cannot be taken, but in the boiling of the beer with hops it remains always in the beer and makes the beer cloudy, when I do not make a correct mashing process, because in the cerealine there is nothing but starch and very little sugar. The only test a brewer can make whether he has taken all the starch out in the conversion is iodine. "Diastase" separates and forms the starch into sugar.

There is another chemical element in cerealine besides starch and sugar. Albuminoids, about between 8 and 11 per cent.; cerealine when it is in such dry condition—I think all cerealine should remain for years and years without changing its quality. Well, ordinary heating you have to take into consideration, and you have to take into consideration what kind of water it is; if it is a pure, clean water there would be no chemical change whatever. Bacteria produces the chemical change. Bacteria is a plant, but we do not know where that plant comes from, but we see it every day. Simple cold water would not hurt cerealine. If you should apply heat and pure distilled water it could not produce any change, but if you come to a very high heat it will change its qualities. If the water is impure it will produce a chemical change; if it has been wetted (the
111 cerealine) this can easily be detected by one who has a good

smell; it is decomposed—injured. The surrounding conditions of the cellar in the fermenting-room to make good beer is pure air; this is the main thing at a low temperature. I mentioned before that we have got apparatus to cool the beer in the fermenting tub itself. With a brewer that has that apparatus it is indifferent whether the temperature in the fermenting-room itself is a degree or two higher, but in the fermenting-room there is generally a low temperature, at between 28 and 41 Fahrenheit—3 to 4 or 5 Reaumur. Beer is injured during the fermentation and mostly during the storage time. All beer this is true of. You don't understand the whole process of beer-making, because it has to remain in the fermenting tubs from 12 to 18 days until the main fermentation is over, and during that time the beer sometimes comes in contact with foul air and gets spoiled in the fermenting-room and gets a bad smell. It remains there in the fermenting tub sometimes 2 weeks, and sixteen or eighteen days. As I said before, the foul air in the fermenting-room—that is, foul air and bacteria in the air, millions and millions of bacteria in the air—and bacteria gets in the beer and spoils it. As I said before, the foul air in the fermenting-room—that is, foul air and bacteria in the air; we do not believe in spoiling by oxidation any more, but we prove that the souring of beer takes place by the influence of bacteria; uncleanliness in the room and taint in the air absorbs this from too much heat. It wants good ventilation and wants to be clean, because cleanliness in a brewery is a supreme law. I do not care if a brewer is competent to brew; he must be strictly clean also, and then he will save his beer by good air in the cellars. The tests made to the beer wort is a simple iodine test; take iodine dissolved in a little water and give it a color like Rhine wine, and then take 2 or 3 tubs with the beer wort in and apply the iodine test; if it gives a blue color then we are sure it has starch in it; and every brewer not using raw meal, such as corn, has to make such a test so as to be sure whether there is any starch in the beer. There is no other chemical test, but the beer will run off cloudy. If the starch is left the beer will run off in a cloudy state. That is taken out from the malt and remains in the beer wort. It is not converted into dextrine and sugar. The conversion takes place by diastase and the heat in mashing. Diastase is a substance produced during the maling process in barley, and has the power only by its presence in what we call the wort as a converter in starch. We say that
112 about one part of diastase can convert about 2,000 parts of starch into dextrine and sugar, but taking too high a temperature in the mashing and you destroy the power of the diastase; it would work no more as a converter. Diastase is not visible to the naked eye. No brewer could know that it was diastase any more. He had to know that it was there, but he couldn't see it. He ought to ascertain it by observing the power of the diastase in converting starch into dextrine and sugar. He couldn't see albuminoids in the beer and he couldn't see salt in the mash. It would require experience and science to understand how to preserve the conditions correctly.

When a brewer or anybody else asks me to state the cause of the cloudiness of a glass of beer or any beer, why, I wouldn't go and make a chemical analysis. The chemical analysis shows the amount of alcohol and extract and water there is in beer, and albumen, but it don't account for the cloudiness. The only way I have to do to know what causes the cloudiness is to make a microscopical investigation. Only by the microscope can I find out what causes the cloudiness. From the beer itself and entirely independent from chemical analysis and entirely independendent from the malt which was used in the manufacture of beer I couldn't tell from being told what was used what made it cloudy. Sometimes it happens—once in a 1,000 times—that the hop kreisin makes it cloudy—that is, ten thousand times, once—that is, some extract of the hop makes the beer cloudy. Yeast is the main thing that clouds beer. I can't tell when I see beer what makes it cloudy. If you were to tell me here is malt, cerealine, hops, water, etc., and out of that beer is made, if this is all that went into the beer, I couldn't tell you what made it cloudy. Albumen is contained in the malt and in cerealine. It is made from the materials. No brewer or chemist can make beer yeast out of cerealine without malt. I have to use the beer yeast in good and sound condition. When I know it is pure, the original beer yeast is good, and when afterwards I see it is bad then I can't say if it was in a bad condition from the malt or cerealine. The analysis would not tell. The microscope might tell the cause of it. I could not find out what caused it by looking at the materials.

Q. Were you called upon at any time in 1884 to analyze and examine beer that come from Kiefer's brewery?

Counsel for plaintiff objects; objection overruled; exception.

113 I made a microscopical analysis of beer from Kiefer's brewery in November, 1884. It was brought me by my son in the end of November last year at my laboratory, in New York, at 202 Worth St. We were asked to do this by an insurance company. I made a microscopical investigation of all the beers brought by — son and labeled with the different vats of Kiefer's brewery. I found the beer full of bad yeast; had a bad smell and taste. I found that in 10 or 11 beers.

By the COURT:

Q. Do you know merchantable beer when you see it?
A. Yes. This was not. It was injurious to the health.

Plaintiff's counsel moved to strike out last sentence; granted.

This examination was made in writing dictated partly by me and partly by my son. This was sent from my office. I have a letter-press copy.

Counsel for defendants offers letter-press copy.
Counsel for plaintiff objected.

(Witness continues:) The letter-press copy is here in court. I didn't

send it to defendants. They had nothing to do with it. I sent to Mr. Pitcher. He is, I think, a representative of insurance company, the German-American. It was after the fire in Kiefer's brewery.

Counsel for defendants offered to read report to the jury.

Counsel for plaintiff objected; objection sustained; to which ruling counsel for defendants duly excepted.

(Witness continued: I) am acquainted with brewers around New York and Brooklyn who use cerealine.

Counsel for defendants called for the production of the revenue books, and I also desire to have the bills from my clients to the plaintiff between May 25 to July 3, 1883, including the last lot. I also desire to make another offer. We have in court here the journal and ledger of this firm kept at the office, No. 1 Front street. We have the person here, I believe, in whose handwriting the books
114 were kept. The journal is, as I understand it, the book of original entry, but perhaps some entries may be successfully objected to on the grounds of different handwriting, but this book contains the summary of all the goods sold, prices received, the parties to whom sold, and the whole record is down here, and I now tender these books to the gentlemen for examination and offer them for admission in evidence.

On cross-examination (by plaintiff's counsel) he testified:

Starch is one of the chemical constituents of corn, varying between 68 and 72 per cent. Then besides this there are salts and water and albuminoids. Albuminoids vary from 6 to 12 per cent., and there is left the husk; that is all. Starch and albuminoids are the principal ingredients. In ordinarily dried corn the water in it is from 7 to 12 per cent. Cerealine, after the heating process, absorbs water again by its own force of attraction. I can't tell what per cent How much it absorbs I couldn't tell. We could dry cerealine down so that it wouldn't contain more than 4 per cent. of water, and then if we leave it in a damp place it will come up as high as ten or twelve per cent. again. In a very damp place I couldn't say whether it would go higher than this or not; I haven't tried it. The absorption by its own force will depend on the length of time you leave it, and it depends on the moisture of the air, and there are too many conditions and circumstances to say about that. The extent that it will absorb water depends on the length of time it is left and the condition of the air. The dampness of the air will start a kind of fermentation. We call now nearly all processes fermentation. It isn't an alcoholic fermentation. There are various kinds of fermentation. There is an alcoholic fermentation and a foul fermentation, as it is called, and then there is a bacteria fermentation and a wine fermentation and a beer fermentation and a self fermentation. A foul fermentation is produced by bacteria ferment. It leads to a decay and a bad smell. Fermentation is decay and decomposition. Fermentation is not the death or dying struggle of live grain, as it forms new life; it is decomposition of the original starch and all that, so we cannot call it death; it is decomposition, and this fermentation

once started in a quantity of meal it will continue to progress unless stopped, and it will go on into decay. Albuminoids give the yeast the right nourishment. They form in the yeast cell what we call protoplasm and diastase. All the albuminoids remaining in
115 the beer give the nourishing qualities to it. From a good beer you must have good yeast, and in starting a new tub you will have to put yeast in to start with. When the yeast is good we get it out of the tub and use it for the next one and keep on so using over and over again, but deleterious substances getting into the yeast tends to injure it, and the longer you use it the worse the yeast will get. I wouldn't say it was slightly affected in the beginning. I always suppose it is good yeast for the first time, but sometimes I take yeast from another tub and it is bad. A brewer shouldn't use bad yeast. If the yeast begins to be injured the oftener you use it with the same deleterious substance in it it will grow worse and worse, and with the same effect on the beer until the beer comes to be destroyed. Now, cerealine isn't malt, but it is a substitute for malt. When I say malt I mean barley malt. Cerealine is made of corn, and of course is not malt, but is a substitute for barley malt. In brewing beer no maltster would take frost-bitten barley to make malt out of. (Answer reiterated.)

I said before that frost-bitten barley or corn—the germ itself—is suffering by that, and in making malt out of barley I explained to the jury yesterday that the germ isn't there in frost-bitten barley, but in making cerealine from corn the germ is taken entirely away. You don't use frost-bitten corn for seed; no farmer would take it, and no maltster would think of taking frost-bitten barley to make malt of.

Witness is here handed advertisement of malt and cerealine and is asked if it does not contain chemical analyses of the two, in answer to which he said the counsel could refer to Prof. Doremus' analysis, as he was not responsible for that. I do not doubt its accuracy, but the analysis that Prof. Doremus made he can more easily explain himself.

Here counsel, assuming Prof. Doremus' analysis to be correct, asks witness to read it.

Counsel for defendants objects to witness reading it.

Whereupon counsel for plaintiff reads in evidence the analysis above referred to, contained in the Brewers' Journal. Analysis is marked Defendants' "Exhibit No. 1."

116 EXHIBIT No. 1.

BELLEVUE HOSPITAL MEDICAL COLLEGE,
NEW YORK, *March 29th*, 1882.

Messrs. Gaff, Gent & Thomas.

GENTLEMEN: At your request an analysis of the product "cerealine," of which you are the manufacturers, was made in order to determine its value as an article for brewers' uses.

	"Cerealine."	Pale kiln-dried malt.
Starch	64.688	58.6
Soluble starch, dextrine, gum, & sugar	6.432	7.3
Cellulose	6.782	10.8
Albuminoids	11.375	10.4
Fat	0.396	2.4
Ash	0.292	2.7
Torrefaction products		7.8
Water	10.035	
	100.000	100

117 From this tabulated statement it will be seen that "cereal ine" compares favorably with pale kiln-dried malt.

It excels malt in the quantity of starch.

In the process of manufacturing corn into "cerealine" it is subjected to the action of steam and subsequently to heat, which converts a portion of the starch into soluble starch and dextrine, leaving the remainder, viz., the unaltered starch, in a flaky condition, so that when treated with water, as a large surface is exposed, it readily dissolves.

The "cerealine" forms a perfect paste with water at 145° Fah't; hence it may be directly introduced into the "mash" with the malt meal and there be readily & completely acted on by the "diastase."

"Cerealine" exceeds malt in the quantity of the albuminoid principles, which not only aid in the fermenting process, but confer highly nutritive — to beer or ale.

The almost entire absence of oil is a most important feature which must commend the "cerealine" to brewers.

118 The ash of the "cerealine" consists mostly of soluble salts, viz., the phosphates, there being nearly 50 per cent. of phosphoric acid.

The presence of these salts adds to the value of the beer or ale.

Thus all the nutritive ingredients which these beverages derive from malt may also be obtained from "cerealine" and without necessitating any change of importance either in apparatus or method of manufacture.

I have the honor to remain your obedient servant,

R. OGDEN DOREMUS, M. D., LL.D.,

Prof. of Chemistry & Toxicology in "Bellevue Hospital Medical College" & Prof. of Chemistry & Physics in "College of City of New York."

119 (Witness continued:) Kiln-dried meal. In this the professor supposes that entirely, that this meal hasn't any water; but regular malt contains between 6 to 10 per cent. of water. These two products referred to are produced by the high heat in the kiln. The beer that was brought to me to be analyzed, in about fourteen bottles, every bottle was analyzed by my son, but the microscopical analysis I made myself; it was different in each bottle and it was reported upon.

Dr. R. OGDEN DOREMUS, being duly sworn and examined for the defendants, testified:

I am a professor of chemistry in Bellevue Medical College and in the College of City of New York.

(Counsel for plaintiff here said that it was unnecessary to prove the professor's qualifications.)

(Continues:) I made this analysis (referring to the Defendants' Exhibit No. 1, in Brewers' Journal) and it is a correct copy of it.

May I say a word in answer to the use of the term "element?" By this question I suppose you mean the substances. I see the point that you aim at. It is that in the barley you have these bodies which are called albuminoids in the germ. (Witness here goes to a chart.) On this chart is a grain of wheat, which is very like barley, Here are the white coats, the gray ones, and the next coats, and the next coat, and then the outside, and here is a little germ. Now, when I analyze the barley malt I find this germ yields me the albuminoids. If I take the corn from whence this has been extracted I find through the tissue of the corn, even after the outer coat has been removed, still the albuminoid bodies, but they are not arranged or grouped as the germ is, which is prepared for the development and the growth of the rootlet and of the little particle that is to come to the air and is to nourish the plant. When the barley is warmed, after being moistened, that little germ begins to grow, and that contains the albuminoid substances. Now, in the analysis that has been read the albuminoid bodies in the corn are spoken of; they are not this germ; that has been abstracted; but still, in with the starch which ts here we have these albuminoid bodies, but they never could develop—could never grow a plant. The vital point, if I may say so, has been abstracted.

By the COURT:

Q. In the barley the albuminoids are in the germ, while in the corn they are not found there?

A. No, sir; but, like a wise father, the parent has given to this little body his support in early life, in the starch, out of which he feeds, and from that are formed the albuminoids; and when the barley is moistened and kept at a certain temperature then that growth begins, at the sacrifice of this starch; the starch be-
120 gins to change; whereas in the corn the albuminoid substances are not from the germ, but from the tissue. A competent brewer could tell, when the beer wort is drawn from the mash tub, whether thus far this brewing had been successful or not. If it had not been successful it (the beer) would lack clearness. It would be more or less foggy and cloudy, and, as Schwarz has spoken, there would be substances there which a good brewer would know were abnormal—not proper—and if the beer was objectionable of course he shouldn't go on brewing such. A lager beer cellar should not be as high as 6° Reaumur, but at about 4°—sometimes a little lower than that—that is, about 35° to 41° Fahrenheit scale. Very great care is taken in good breweries to obtain this low temperature and enormous amounts of money are expended upon it. The effect on beer at an improper temperature is that the fermentation goes on in an abnormal way and the effect would be to spoil it.

Mr. Tracy objects to a question about unclean cellars, but witness says:

Impurities in the air will injure the beer. It is exceedingly sensitive to the action of these germs that are constantly floating in the air, and the cellars should be well ventilated and thoroughly purified. I am not a professional brewer, but I have made analyses of beer for the last thirty years.

HENRY ELIAS, being duly sworn and examined as a witness for the defendants, testifies:

I am a brewer and know Mr. Gent and have been in the habit of buying goods from them. I bought from them from April 4 to July 8, 1883, cerealine.

Q. Is the paper I now hand you, and which you have produced, a bill for cerealine by Gaff, Gent & Thomas, April 4, 1883?

A. Yes.

The bill is offered in evidence.

Q. State the dates and amounts of cerealine bought by you from Gaff, Gent & Thomas from April 4, 1883, to July 5, 1883.

(Objected to as immaterial and irrelevant. Objection overruled; plaintiff excepts.)

Witness continues: I bought, April 19th, 5,400 pounds; April 21st, 7,200 pounds; May 21st, 12,600 pounds, and June 28, 29,775 pounds, and I used these goods to manufacture lager beer. It made

a good beer. I had been using these goods a number of years previous, just us good.

121 On cross-examination by counsel for plaintiff he testified:

From May 21st to June 28th, during this short time, we did not buy any, but we bought again after that. According to this memorandum we bought some cerealine from May 21st to June 28th. On the 21st of May—the next is the 21st also—we bought two lots; the next date is June 28. We sent no cerealine back and used all we bought.

MAX SCHWARZ, being duly sworn and examined as a witness for defendants, testifies:

I am the son of Anton Schwarz. I recollect the circumstance of analyzing some beer at 202 Worth street. I remember the time and occasion. I took the beer to my father for investigation. I got it from Mr. Kiefer's brewery, the one he claimed burned. I went at Mr. Pitcher's instance. He is connected with the German-American Insurance Fire Company. I took fourteen samples—thirteen samples out of different vats, and the fourteenth was the beer Mr. Kiefer was selling at the time. The vats were in the cellar, and from ten I took thirteen samples, and the fourteenth I took from Mr. Kiefer's saloon in the presence of his foreman. I took it to our laboratory at 292 Worth street. These were the samples analyzed, and I took the chemical part of the analysis. The question I had to answer was to get the amount of alcohol, extract, water, and acid in the beer, especially acetic acid. I made these analyses, and I found there was two to five per cent.; but I found that some of the samples didn't have any alcohol, but it was all converted into acetic acid. But in one sample 4 per cent. of it was acetic acid. This effect was to sour the beer. It was cloudy, and when we gave the beer time—about an hour—it formed a sediment and settled down. The day I took the samples was 24th November, 1884. There was a report of the chemical analysis; the copy is in our books; I have them here in the court-room.

Counsel for defendants then offered the report made by the chemist as a part of "*res gestæ*." Although he conceded himself it was not competent evidence, he tendered it to the other side for the purpose of cross-examination.

122 On cross-examination by plaintiff's counsel he testifies:

Yes, I took 13 samples out of 10 different vats in the cellar. Mr. Kiefer told me there had been a fire. It was at the request of the insurance men that I went there and got some beer to analyze.

EDWARD C. HAZARD, being duly sworn and examined as a witness for the defendants, testifies:

I am a wholesale grocer, and I know the firm of Gaff, Gent & Thomas; I have had business dealings with them. I purchased during the months of June and July, 1883, some cerealine. The ex-

act dates are: April 20th, 9,000 pounds; May 2d, 9,000 pounds; May 8th, 9,000 pounds; May 13th, 9,000 pounds; May 14th, 4,500 pounds; May 19th, 4,500 pounds; May 21st, 9,000 pounds; May 29th, 9,000 pounds; June 4th, 29,000 pounds; June 25th, 4,500 pounds. That is all. I used this for cereal food. I examined it and packed it as a substitute for hominy. I had been using cerealine a number of years prior to this purchase, and there was no difference in the quality between this lot and that previously used. Yes; they were the same quality. I sold them to grocery stores. I heard no complaint of their being bad.

Here a juror asked witness if they came in bags marked diamond "C."

A. What was packed in bags was marked "Hazard's Crushed Indian." When we bought it from Gaff, Gent & Thomas it was marked diamond C.

On cross-examination by plaintiff's counsel he testified:

I don't know what particular store I got the goods from nor what particular warehouse. I simply looked at them and mader no other examination. This was the article (looking at a box of cerealine). We sold it as our own article. This is all I know.

HENRY KIEFER, recalled and further cross-examined by counsel for defendants, testified:

Q. Whereabouts is your brewery office?

A. 138 Scholes street; that is, in Williamsburg, Brooklyn, eastern district. The cars run by there, and my house is next door to the brewery. These revenue books that I have produced here are the books for 1882, 1883, and 1884, and all the beer I manufactured during that time is entered in them.

123 (The books were offered in evidence without objection).

These books show the daily manufacture of my goods, and are sworn to as correct.

Q. This young beer that was made—say on the 28th of May—did you reach the process of finishing the young beer on the 28th of May?

A. No, sir; nor would I reach the process of having some beer in the month of May. I manufactured young beer in the month of May, as I am manufacturing beer all the time, and young beer is lager beer not over so many days old, and this beer I mixed with stock beer. Sometimes we used this young beer to lively up beer and sometimes not for a week, ten, or twelve days. It ran from the time we used old beer to liven up stock beer, and after 10 or 12 days it would run again. Say we made beer—and we used livening up beer sometimes, say 15 or 20 hogsheads that we would lively up at a time—in a 40-barrel hogshead we used from 7 to 8 barrels young beer; this was done in 2 or 3 days. The young beer that we put in to liven old beer is from 50 to 60 hours old, and we call that kreisin. This and young beer are the same thing. It depends on size of

hogshead how many gallons were put in. I have a regular account for returned and rejected beer—the daily deliveries and returns. It is up home with my other books, and I will produce it with the others, if I am ordered. I have no objection to producing them. I couldn't tell the dates of the return of this beer without my books; but I think the months were the latter part of May, June, and July, although I wouldn't be positive without my books. We turned this returned beer into the sewer directly after tasting it to see if it was good for anything. The revenue officers had nothing to do with the beer returned from customers, and I paid and lost the tax on it. I cannot tell the months exactly that this beer was returned, as I don't remember whether it commenced the latter part of May or the fore part of June. My book will show the names of drivers, but I don't know whether it shows what customers the beer was returned from. I had a regular book-keeper for that book, but I did not charge the parties with the amount on my book; they paid no money for it. We had charged it but took the goods back; but when we first sold it, that we charged to them on our books and credited them when they returned it, and gave them other beer in place of it,
124 which we made. Our books will show the amount sold, returned, and the day and date of same, and, I think, the name. The beer during three or four months in the summer of 1883 was about two hundred and sixty-five barrels. I don't remember how much beer I was selling during the month of May. The two hundred and sixty-five barrels that was returned was run into the gutter, and I made no effort to sell them for any purpose. I couldn't return them to you. I knew that as soon as I saw the beer that it had been spoiled by the goods you had sold us. No, sir; I did not know that the goods I bought of you spoiled my beer. I learned first the goods I bought of you were spoiling my beer on the 2d or 3d of July; my foreman told me, and that is the only way I knew it. I had notified Mr. Bennett in the fore part of June. At this time I knew I had bad beer. I was positive on the 2d day of July that it was your goods that spoiled my beer, but I supposed it was so before. I knew nothing else but your cerealine that would spoil our beer. Very early in June complaints began to come in about the beer from my customers, and I thought it was your cerealine. I then sent for Mr. Bennett for the first time early in June; I don't know what day. On the 3d of July we made up our minds positively that it was your cerealine. I then brought Mr. Bennett, showed him the cerealine, and told him he had ruined me. The first time I sent for him he said they (the firm) were responsible for the goods, and he refused to take it back. The revenue ran some other beer in the gutter. I was not compelled to call upon revenue in order to save the box, but we were compelled to call upon the revenue to have our number of barrels correspond with the revenue and with the malt and the cerealine purchased. I had to account for all the material that was used and had to purchase and did purchase, as shown here by a certain number of barrels of beer each month, and that number of barrels of beer had to correspond with the quantity of material
125 I used. Our purchase books will show this. All the beer in

my brewery is accounted for; but the beer that was returned did not have to be done in that way. You will find all but the 265 barrels in that book and all that I sold also. The barrels returned are in my shop books, and the quantity and quality of material will be found in my material book, and I guess they are now in my possession. The books will show you how my trade corresponded during the months of June, July, August, September, and October, 1882, 1883, 1884. In the spring of 1883 I had a better trade than I did in the spring of 1882. Yes, sir; and I sold more beer up to the time the beer turned bad. I had a splendid trade in 1883. The trade in 1884 was less than in 1883. In October there was 1,580 barrels destroyed by revenue officers and run into the gutters, and 265 barrels returned within six months; but that isn't shown in these books. The 1,730 and 750 barrels that was not included in either of these statements of spoiled beer was run in the sewer by the revenue. This was done December 5, 1884. The fire in my brewery occurred on the 8th of October, 1884. I did not make proofs of loss myself; a man by the name of Walton was acting for me, and made out the proofs of loss. Mr. Walton was an adjuster. I can't say whether the proofs of loss were sworn to by me or not; I don't remember. I did not myself claim a loss for the beer that was in the cellar at the time at full price and the claim was not in writing. I did not cause a claim to be made upon the insurance company for this beer; Mr. Walton made it. I told Mr. Walton not to put in the loss about this bad beer. I don't know whether I swore to it or not or whether I signed it. I am willing to tell all I know about the matter, and for this identical beer I made no claim for it, and I cannot tell you whether the adjuster did or not. The claim has not been paid, though I have had a settlement with insurance company, but not for the beer. I gave the insurance Co. a receipt for the money.

126 This beer lay all the time in my cellar undisturbed until it was thrown in the gutter by revenue officers. My beer is not in the cellar at all, but in the storage room, and the storage room contained those tanks, and the beer was in tanks all the time clear up to January, 1885, standing in the storage rooms, and the tanks were closed. The storage rooms are my beer cellars. Some of these tanks held 110, some 125 to 130 barrels, and had never been drawn off until it was turned into the gutter. I want the jury to understand that this beer stood in wooden tanks from 1883 to 1885, in my beer cellar, without being drawn off by anybody for any purpose whatever. About the fire: It was outside of that, in the rear of the building, and didn't burn in there at all, so far as I know, nor was there a fire in the cellar at any time. There are three storage rooms, one on top of the other, and these tanks were stored in two different rooms—in number twenty, in both rooms—and the revenue officer ran it all off—that is, all of that that was bad. As we had other beer in there that wasn't bad, how much I don't know, and my books won't show how much beer was in one storage room, but it would tell me how much was in the bulk at the end of the month. That Government book will certainly show the total amount of beer

on hand from that source on the 1st day of December, 1884, but not for one day, and it charges the quantity that you manufactured every day, and it will show the total amount I had on hand November 1st, 1884. I can't tell you how many tanks of beer I had in all in my storehouse after running off the 1,730 barrels. I certainly had beer — other places—in the fermenting-room and
127 vault cellars—and we have three or four vault cellars, and the storage rooms are on top of the cellars. On the 1st of December, 1884, there were 3,502$\frac{11}{12}$ barrels of beer, out of which the revenue — took 1,700 barrels. On the 1st of September, 1883, the book shows I had 4,200 barrels. Now, whatever is sold during the month is added together and deducted from the previous month's statement and carried to next month. I could not tell nor give the jury any idea how much I had in the fermenting-room. The vats or kegs that contained beer in the storage room, you take one room at a time and commence one place or another, and that is all the way you can tell. We have a record in the fermenting-room when the beer was put in the warehouse, and I could not tell by looking at the kegs or packages when the beer was manufactured, but the foreman generally has a mark; he ought to know the month and the day. I have knowledge of what month beer is manufactured in and a record which shows me when I have a lot of kegs or barrels filled, and can tell when they are made. I could tell the oldest beer by the taste, but this is not the way we always tell, and when I go into my storage room I can always tell which is the oldest beer, but I cannot tell in what month. We have no brand; the foreman keeps a record with chalk on the hoops of the vats. When the beer was ready to send out we put it in kegs or hogsheads. When the beer was destroyed it was in vats, and these vats would hold from 110 to 130 barrels. The foreman had marks on the vats to tell how old the beer was. I don't suppose there were any more marks on when the beer was left to run off, because it was so long. Previous to when the revenue officers let it run and previous to the fire I know there were marks on them, as I saw some of them. They were—well, take—for instance it was the month of May, it would be a "5" and streak across—that is, the 5th month in 1883, or whatever the year may be. These marks are
128 made with white chalk, and I saw them before the fire; how long I don't know. I knew it was bad beer and had known it since July, 1883. In October, 1883, I had 1,500 barrels destroyed by the revenue officers, and I knew then that I had 2,500 barrels spoiled beer and did not report it or say anything about it, but 1,580 barrels I did have run off in order to make some room, as I needed the room. I left this other beer there at the suggestion of my counsel, because the case was pending. I kept 2,480 barrels all the time, under the advice of my counsel. I can't say whether I told anybody it was there or not, but I told counsel. My counsel told me to hold all the beer, but I told him I couldn't. When I entered my complaint I told him all about it. He told me about that time to keep it for the purposes of this suit. I didn't keep it because I had to have room; that is the only reason I have.

I had to use those tanks. At the time I told my counsel of this beer there was much of it that lay dead and I had to have good beer. I stored nothing but beer in this room. Cerealine was used to make all that beer, to wit, 1,500 barrels, 700 same, 1,700 same, and all that we made during those months; I know this. I had no bad beer after I stopped using cerealine. It was used in every brewing between the 25th of May and the 3d of July, 1883. I saw the cerealine most certainly that was used in making this beer in every brewing. Yes; I know whether it was new beer or stock beer. It was all stock beer. It becomes stock beer after it is three weeks old—after it is away from the ferment. I don't sell lively beer at all. When the beer is taken from the ferment tub it becomes stock beer if it rests one week. If it rests one week we call it stock beer, but it isn't beer that is ripe and fit to go out. It ought to be from four to six months old before it is fit to go out. At that period of 1883—I can't say how long I kept my beer—some of this cerealine beer was kept from 1883 to 1885. We sold and sent out part of this beer after we livelied up the other beer. Of course, the few barrels that go into a large hogshead went along with the stock beer. I mixed some of the beer made in July, 1883, with the older beer. This beer was probably three or four months old.

On cross-examination Mr. Kiefer continues: In the spring of 1884 my brewery was turned into a brewing company. The capacity of our brewery is about 50,000 barrels. We could turn out 80,000 barrels in a year. It would be necessary to keep 20,000 barrels on hand to have four months' old beer. In the summer when trade is brisker, why then we run it off so much faster.

129 IRA EDWARD THURBER, witness for defendants, being duly sworn and examined, testifies:

My business is that of a wholesale grocer. I am a member of the firm of Thurber, Whyland & Company. I know the defendants, Gaff, Gent & Thomas. We did, during May and June, 1883, and during the year, buy cerealine from defendants—exact dates, May 24 and June 22. We have been using their goods a number of years, selling them on the markets of London and the United States. The goods in June and July were the same as prior to that time, and we have never found any difference.

On cross-examination by plaintiff's counsel he testified: We sold this for the purpose of food and not for brewing purposes. We sell them in packages to retail dealers, and this is all we used them for. During June and July, 1883, I personally examined the cerealine. (Witness reiterates statement.) I tasted them and thoroughly tasted them. They came in bags with the trade-mark of the house on them—"diamond C."

* * * * * * *

ANTON SCHWARZ, recalled by the defense, testified:

Q. What would be the effect of keeping, say, ten vats of beer—spoiled beer, sour beer—in a storage room mingled with other beer?

(Plaintiff's counsel objected; question put again, "mingled" left out; plaintiff's counsel objected again; objection overruled; exception taken.)

Witness continues: If sour beer, even in tight vats, was left for a year or a year and a half in a storage room with other beer it would spoil the other beer.

Counsel for plaintiff wants this understood.

* * * * * * *

GEORGE GOLDMAN, being duly sworn and examined as a witness for the defendants, testified:

My age is 32. I am manager of the New York branch of Gaff, Gent & Thomas. In 1883 I was employed by said firm as a traveling salesman in the West as well as in the East, starting from Columbus, Ind., their mills being located there. I sold cerealine for them during the months of April, June, July, 1883, to various brewers East and West. I know the cerealine I so sold at that time to be in good, sound, and solid condition. It was as good as I sold previous, in January, 1883, as then I commenced to travel for them. There was no complaint from brewers to me nor any goods returned as unfit to make beer of.

No cross-examination.

130 HENRY KIEFER, recalled and further cross-examined by counsel for defendants, testified:

I remember the testimony of yesterday about the two lots of barrels. The 730 barrels turned out December 5, 1884, were stored in the storage room. There were some stored in each; none in the cellar below. I cannot tell how much was stored in each, but I knew how much were in the tanks. I don't know about the proportions of each room, either. I can't give you any idea whether 700 barrels were in the upper room or not; I don't know. I know the insurance companies. I saw the agent several times. I suppose he called at my place about the time of the fire. Mr. Pitcher and I have had different conversations, but I can recollect nothing in regard to the beer. I couldn't recollect having a conversation with Mr. Pitcher when my foreman was present. Mr. Pitcher was there several times. I cannot recollect when Mr. Pitcher asked my foreman many questions (reiterated). I do not remember that. I don't remember making the remark that "you guessed you'd get out of there" when you said Mr. Pitcher was talking to my foreman. I don't remember that I said Mr. Pitcher was asking questions which didn't concern him. I remember nothing of the kind (reiterated). I don't know that I discussed any beer with Mr. Pitcher. The adjuster had it in hand. I couldn't tell you whether or not there was a claim for 1,450 barrels. I don't remember talking about any beer spoiled by the fire at all. The wall back of these tanks is a brick wall. My attention was called to the fact that fire had been kindled there where these tanks were, but I don't think this was done by Mr. Pitcher. I don't remember having any conversation about beer

being drawn off. Mr. Pitcher was there three or four times. He was not adjusting the loss for me; Mr. Walton was doing this. He, Walton, represented me and Pitcher the insurance companies. I caused no claim to be filed for the 1,400 or 1,500 barrels of beer, but I don't know what Mr. Walton claimed. I know where this beer was in the tanks.

Q. Don't you know where this beer that you run into the gutter afterwards stood in your cellar? Don't you know the particular cellars? Didn't you say it was marked with chalk?

(Objected to by the plaintiff's counsel. Objection sustained.)

(Showing witness revenue book.) That is all my report—the whole of it, books and all—and my affidavit is attached to it.

(Defendants' counsel offers material book.)

The word cerealine was written in there by my book-keeper, John Schafer. He is my book-keeper now.

131 WILLIAM R. PITCHER, being duly sworn and examined as a witness on behalf of the defendants, testifies:

I was the insurance agent on behalf of the insurance companies who adjusted the loss on Kiefer's brewery, in October, 1884. I visited the brewery and had personal conversations with Mr. Kiefer. I visited Mr. Kiefer's shortly—I think within two days—after the fire and looked about the brewery, and found at that time that he had engaged a Mr. Walton to adjust the loss. After looking about with Mr. Kiefer and Mr. Walton I returned to New York, awaiting a schedule, which was to be furnished, of the items upon which they claimed damage. Within a reasonable time those schedules came to hand at the office, and I then, in connection with Mr. Silvey (it was in connection with him), visited the premises. Mr. Silvey was also on behalf of the insurance companies. We met Mr. Kiefer at that time and a number of times afterwards. We arranged to have an appraisal upon the machinery items. After examining his tanks, in connection with his machinery claim, arranged to have an appraisal on the buildings, or rather to get an estimate on the buildings. Then we looked at the beer that Mr. Kiefer said was damaged in consequence of this fire. Mr. Kiefer stated that the beer which was in the middle cellar — contained in ten tanks; that he found had been damaged in consequence of the fire, and so he started to run it from the middle cellar into the lower cellar, the lower cellar also being filled with tanks as well as the cellar above; that after they had run eight tanks from the middle cellar into the lower cellar they discovered that it was no use to try to save the beer, and consequently they had decided to run it out; that the tanks in the lower cellar were clean and nothing in them; that the tanks in the middle cellar were clean and no beer in the cellar above. We tested the condition of the beer and discused the question as to how it had become damaged. Mr. Kiefer claimed that the beer was worth $4.60 a barrel; that this beer that was in this middle cellar was sound before this fire, as he had been up there

and examined it himself, and that it was in consequence of water being thrown into his upper cellar that it was in the condition we found it. There were two tanks in the top cellar; how many more I don't know. There were four cellars, as I remember—upper, middle, and lower and subcellar. The fermenting vats were in the lower cellar, according to my recollection. This building that I refer to was the building which was immediately north of the ice-house that burned—the——

132 Q. Where is that schedule now that accompanied these papers that came to you for adjustment?

A. Do you want all the papers?

Q. (Showing witness a paper.) Tell us how that reached you?

A. That reached me through Mr. Walton, in connection with the other papers which were used at the time of the settlement of the loss.

Counsel for defendants offers paper in evidence.

Objected to by counsel for plaintiff.

Witness continued: This was given me, witness continued, by Mr. Kiefer in connection with all the other papers. The loss was already adjusted and proofs made out before; there were some policies covering stock and others covering the building alone, and some covering machinery. We paid for no beer.

Q. This schedule was presented as a part of the claim?

(Objected to.)

—. I cannot tell you the exact date Mr. Walton gave me the paper—a few days subsequent to the fire; they came to the office in connection with the other papers.

(Objected to.)

Q. You didn't receive it yourself?

A. I received that paper from Mr. Walton or one of his clerks. Mr. Walton acted throughout in the settlement of this loss.

Q. Did Mr. Walton, pending this investigation, pending the time that this loss was being investigated by you on the one side and he on the other—did Mr. Walton say that this paper was a part of this schedule connected with the proofs of loss?

(Objected to.)

Q. What did he say?

Counsel for plaintiff objects to the evidence as incompetent and hearsay.

133 On cross-examination by plaintiff's counsel he testified:

I am at 50 Wall street with the Royal Ins. Co. I occupy a desk right opposite the hall which is at the rear of the hall. I don't know how many desks there are in this room. The papers generally come through the door by messengers, sometimes by mail. I know that these papers in connection with this loss came by messenger, as I (reiterated) have never received a paper from Mr. Walton's office

by mail. Mr. Walton himself or one of his attachés brought this paper and three or four others. This was the same paper was presented to me before the interviews at the brewery, and I had the paper before the interviews at the brewery. I can't say positively how long before. I first learned that Walton represented Kiefer at the brewery. I had not received the papers before that, but before the interviews. I received the papers before Kiefer told me Walton represented him, and received the paper subsequent to that. I do not know whether it was brought by Walton or a clerk. I do not remember the facts attending the receipt. It was delivered to me personally because there was an appointment made at that time with whoever brought it in regard to the time we should meet—that is, with Mr. Walton, who was sent from Kiefer's brewery to adjust his loss. This paper, attached to others, was the first brought. This paper was not handed me by Walton before I had been to the brewery, for I had been to the brewery after the fire before I received the paper, and had an interview with Kiefer before that. At that time Mr. Walton told me Mr. Kiefer was present. We looked about, and I asked them to send in schedules upon the property which they claimed was damaged, and this is the paper that came in pursuant to that request, and upon these papers we rejected the loss; we rejected the beer.

By counsel for defendants:

Q. After this paper was received you had interviews with Mr. Kiefer, I think you said, in which he made a claim concerning beer—what was the claim, do you remember?

A. That was the paper we discussed in which his claim for beer was made. (Continues:) Mr. Kiefer claimed that the beer was ruined in consequence of throwing water into the cellars and over the tanks, and the water coming down into the tanks soured the beer.

134 Q. What does he claim for 1,450 barrels of lager beer, amounting to $6,670, and 712 barrels, amounting to $3,275; was that the claim Mr. Kiefer urged, or that you were discussing at any time verbally with him?

(Objected to.)

Q. What claim did Mr. Kiefer make for beer in any conversation with you, if any?

(Objected to.)

By counsel for plaintiff:

Q. You disputed this claim, you say, for this beer?

A. I did. The insurance company sent a man over there to examine this beer after the fire—a Mr. Schwarz—and Mr. Schwarz reported that the beer was spoiled before the fire; that it had not been injured by the water. He reported that it had been spoiled a considerable time before the fire. I insisted that this was the fact from the beginning. It was not included in the proofs of loss, and I settled my claim by leaving out the beer and rejecting it.

Mr. MOULTON: I will offer those proofs of loss.

WILLIAM J. PITCHER, recalled for defendants, testified:

Q. Did I ask you what was said to you by Mr. Kiefer about running off beer from one cellar to another in tanks?

A. From the middle cellar into the lower cellar. It was said that there were ten tanks in the middle cellar and he ran off eight tanks; there were two tanks left in the middle cellar. I had a conversation with him about all the beer. The tanks in the middle cellar were left there. I don't know what finally became of them. There was a discussion about those tanks and those in the top cellar. In discussing this matter with Mr. Kiefer he said that the only beer he claimed was damaged, in consequence of the fire, was this beer in the middle cellar, which he had run into the lower cellar and racked it off. When he was confined to that point I then stated to Mr. Kiefer that there was some beer in the top cellar and in the middle cellar. He disputed that there was any beer in his ice-house building, in that cellar, though there was. I was in this cellar and we
135 pointed out some of the tanks which was exactly in the same condition. When we went there to take samples in connection with the other beer it had gone, and the tanks were empty. (Showing witness paper, Exhibit C.) I can only say that that letter reached me in the ordinary course of mail. I got it and replied to it on the 3d of September. I don't know whether it was shown to Mr. Kiefer. I don't know that it was shown to anybody.

Q. Was it made the subject-matter of discussion with Kiefer—the beer—that is, this beer that was in controversy? Had it been made the subject of discussion with Kiefer after this letter was received?

(Objected to; objection overruled; plaintiff excepts.)

A. I am not sure whether I saw him subsequent to the receipt of that or not. I do not know of my personal knowledge anything about the letter being written by Mr. Kiefer than what I have already stated to the jury nor by any admissions of any of his men. It reached me in the regular course of business, and I replied to it. I have a copy (witness produces paper)—a press copy.

Counsel for defendants offers a copy of reply in evidence. Counsel for plaintiff objects to it as incompetent.

(Objection sustained. Defendants except.)

WITNESS (continued): The date of the reply is the 3d day of December.

(Counsel for plaintiff objects.)

Q. I ask you — the reply was sent.

Counsel for plaintiff objects.

(Objection overruled.)

A. I sent the reply through the mail and I received no answer to the reply.

Q. (Showing witness paper:) You may look at that paper. Are you an expert in handwriting?

A. No, sir.

136 HENRY KIEFER, recalled for further cross-examination by counsel for defendants, testified :

Q. (Showing witness letter:) Was that letter sent from your brewery or not, or from your office or from your house?

A. That was not my handwriting.

—. That was not the question you were asked. Was it sent?

A. Not by me.

Q. Whose handwriting is it?

A. It looks like John Shafer's handwriting. I couldn't swear to it.

Q. That is your belief?

A. That is the best of my belief.

Q. Who is John Shafer?

A. He is my collector.

Q. He was at that time?

A. Yes, sir.

Counsel for defendants offers the letter in evidence.

(Objected to.)

Court ruled that it is not competent unless proved that he directed it to be sent.

Counsel for defendants calls the court's attention to the fact that it was written by his book-keeper.

Court ruled that it was not competent unless the witness was connected with it.

(Defendants except to court's ruling.)

WITNESS (continued): John Shafer is my collector. He makes the entries of his collections in my books. He does nothing else. He is out from morning until evening. I have a book-keeper to write my letters. When John Shafer was book-keeper he was in the habit of writing letters. He was book-keeper long before this. He is not the man who was book-keeper in June, July, and August, 1883. He did not make the entries to which my attention was called yesterday, nor is the word "cerealine" in his handwriting anywhere. He was not my book-keeper in June or July, 1883. (Reiterated.)

137 Counsel for defendants then asked for books of plaintiff.

(Counsel for plaintiff objected; objection overruled; plaintiff excepted.)

Showing (plaintiff) witness' letter. Witness read the letter and said that it had not been sent by his authority; that he hadn't read the letter before. I have a brother-in-law that does all my insurance business, and I judge it was done through his instigation, for I know nothing about it. My brother-in-law's name is John Dellamire. I think he was about the office there. Since I heard there was a letter in court yesterday I couldn't say. It was something new to me, a letter being here in court that I should have sent.

Q. Where is John Dellamire?

A. My brother-in-law is out of business. I couldn't say where he is.

Counsel for defendants here stated to the court that he sufficiently proved the letter from the witness' own statement, and I now offer to read it to the jury. It is proven that it was received by the man to whom it was addressed, in the usual course of mail; that the witness says he thinks his brother-in-law caused the letter to be written by a man in his employ.

The motion was denied.

(Defendants excepted to the ruling of the court; noted.)

Q. I want you now to take your book, if you have sufficiently examined it, and tell me how many barrels of beer were returned by your drivers in the different months of May, June, and July, giving each month, if you have taken them from that book; what beer was returned during May and June—how many barrels.

A. In May and June?

Q. May and June, separately. How many barrels of beer were returned from your customers—tax-paid beer returned from customers during that month—if you please, and give it to the jury?

A. Well, I have it here from the 28th of May to June the 3d.

Q. June or July?

138 A. I am giving it to you regularly. There is twenty-one quarters and two-sixths. From June 4 to June 10th there is twenty-eight quarters and eight-sixths, from the 11th to 17th.

By the COURT:

Q. Is that a correct statement of the beer that was returned from the books?

—. I copied from the date you see here. It is June 28th. There is the commencement of it. The pages are not numbered. Every day is dated. I checked the beer returned to me in quarters.

Counsel for defendants offers paper in evidence.

(Witness continued) (referring to book:) That it shows 1,600 barrels returned. I figured them into quarters. There are of these 2,073. The half barrels were reduced to quarters and kept so from week to week. I didn't figure up the sum total of all the quarters. I cannot figure till the 1st of October. I haven't got September in. The "715" are in quarters. We have had beer returned all the time—all the year round. I have a comparison between September, October, and November; I have a comparison there of 1882. I have figured up to the 2d of September, 1883. I stopped then, as it was time to come over to court. I can tell in ten minutes how many barrels were returned in September.

Q. Now, just take your book with your counsel and figure that up and we will submit the paper to the jury.

139 By COUNSEL FOR PLAINTIFF: I understand you to say that you had a fire in your brewery?

A. Yes, sir; and considerable water was thrown on the vats of beer. The vats have a bottom and also what I call a "top bottom," and in this top bottom there is a bung-hole. No; the man-hole is in the front; it is in the side. This hole is about four or five inches.

I suppose about four or five inches of stave run over the tanks. Water did get into the beer in consequence of the fire.

By counsel for defendants:

Q. Could it have run into all the tanks or only a few of them?
A. It run over, broke the floor through, and run from one floor to another. Water could only get in through the bung-hole. The tanks were so situated in the three storage rooms.

By counsel for plaintiff:

Q. I will ask you to look at the similar week in July, 1882, where you sold 2,800 quarters; how many were returned?

(Defendants' counsel objected to this as incompetent; objection sustained.)

Q. How long before the fire was this beer destroyed?
A. The year previous almost.

JOHN GREEN recalled and further examined by counsel for defendants.

Witness testifies:

I know Mr. Elias; I know that goods were delivered to him in the months of April, May, June, 1883. The goods delivered to Mr. Elias on 1st of October, 1883, were from 43 Water street. I delivered them personally. Mr. Kiefer did not get goods then from 43 Water street, but got some later. Mr. Elias got goods during April, May, June, 1883, from the same stock that Mr. Kiefer got goods. These were delivered from pier 4, North River. Mr. Elias got goods during April, May, and June, 1883, from 43 Water street, 37 Water street, 15 Water street, and pier 4, North River. They were put in the same bags, kept in the same place generally, and were, in fact, of the same lot of goods.

140 On cross-examination by plaintiff's counsel he testified:

Mr. Kiefer got goods right along on the 4th of April; Henry Elias got it from 43 Water street on the 4th of April; Kiefer got some of the same lot from 37 Water street. I don't remember another day exactly when they got another lot. I swore to it on direct examination because I know it is so, and I know they got the same day. I knew this to be a fact (reiterated). What makes me remember it was on the same day is this: I have to put on the book when we get an order to deliver it. Each man brings an order and he signs for it when he takes it away. That is the only way I have to collect our storage and that is the only proof I have of the delivery of the goods. There were in the neighborhood of four or five car-loads a week being received on different days of the week. Sometimes they were rode from the dock to the breweries; at the request of the agent, sometimes they were loaded from the dock. You could always notice when they were bad. In the car-loads

some were bad and some were good. I don't know whether by heat or not. We never put any goods back in bags marked ⟨C⟩ that the inspector has condemned. We never did (reiterated). No, sir; nor into the same bags we took them out of. We did not sift goods that the inspector did not condemn. We sent the bags we took it out of back to the mills. We didn't scrape the bags marked ⟨C⟩ and put the meal back into them. We did not put them back in the same bags and sell them as good goods to brewers.

By counsel for defendants:

Q. You have compared the statement in your hands with your books?

A. Yes, sir.

Counsel for plaintiff objects to the contents of these books.

141 Counsel for defendants offered the paper in evidence.

Counsel for plaintiff objected to introduction of paper in evidence; objection sustained; to which ruling counsel for the defendants duly excepted.

WILLIAM J. HUDSON, being duly sworn and examined by counsel for defendants, testified:

I reside at 385 Union street, Brooklyn; I am a truckman, and have been for five years; have been in the employ of Gaff, Gent & Thomas about four years. I was in their employ during April, May, June, and July, 1883. During that time I delivered goods for defendants from storehouse at 37 Water street, and no other. I delivered the goods during that time Henry Kiefer. I wouldn't say positively that I delivered goods to Mr. Kiefer and Mr. Elias on same day, but likely we did. I wouldn't swear positively to the date now.

Defendants' attorney then asked if he had delivered goods of same general lot to both Kiefer and Elias.

(Objected to; objection sustained; exception; to which ruling counsel for defendants duly excepted.)

There were probably three or four thousand sacks stored in 37 Water street during the months of April, May, June, and July, 1883. We received goods from the mills at different periods; sometimes from the store to the dock. I rode them there and stored them. Every bag was inspected that went to Henry Kiefer. I was present at the delivery, as I invariably hauled them to the edge of the truck myself. The cerealine (which was delivered) was inspected in my presence. I saw it inspected. He run a tryer through the middle. Certainly I saw the cerealine that he drew out through the tryer. As to its condition, I don't know any more than I know the goods were sent through the inspector satisfying me.

Counsel for plaintiff moved to strike out that answer.

The tryer is a smooth steel instrument about probably that length (indicating on his hands), with a wooden handle, rounded on the end so as to enter the bag, and so in drawing it out it leaves a very small hole. It is all hollow, a cylinder, and, of course, it is open
142 at the top, and that draws out a sample, and he puts it in and goes through the bag endways and draws out goods similar to this. It is drawn once through the bag. I delivered no goods to Henry Kiefer at 15 Water street nor at 43 Water street personally. I delivered no goods from 43 Water street. I wouldn't say positively that I was present at the delivery of any goods from 43 Water street; likely I was. I delivered cerealine to Henry Elias from 37 Water street. I wouldn't swear, but my book will prove that I delivered cerealine to other brewers from 37 Water street the same day I delivered to Henry Kiefer. I ran the store at 37 Water street. I couldn't enumerate all the brewers to whom I had delivered cerealine; maybe a dozen; maybe less.

HERMAN A. SCHALK, being duly sworn and examined by counsel for the defendants, testified:

I am in the meal, hop, and grain business. I live at 117 E. 92d street, New York. I was in the employ of Gaff, Gent & Thomas during the months of May, June, and July, 1883—no; not May and June; I went with them about July, 1883. I know the plaintiff, Henry Kiefer. I knew also Conrad Ament, his foreman, during that time. I had an interview with Kiefer in July, 1883, at his brewery. I received a notice to go over to Mr. Kiefer to see about some beer that he said was damaged by our goods—goods received from Gaff, Gent & Thomas. I was then in the employ of O. O. Bennett, their agent. I went in response to a letter received by Mr. Bennett as his (Bennett's) representative; it must have been in the latter part of July. I went to Mr. Kiefer's brewery, and he said that his beer was spoiled by goods received from Gaff, Gent & Thomas, and they showed me some goods there that wasn't cerealine, but it was meal; it was spoiled, but it wasn't cerealine; it was meal—yes; cerealine meal. He didn't say how they were spoiled. A re-
143 mark was made, but not in presence of Mr. Kiefer, as he was not there. That was about all the conversation. I went to the cellar and saw the beer was there spoiled, and told Mr. Kiefer it was very much soured. I told him I didn't see how a brewer couldn't see what the goods were before he used them; that every brewer ought to know whether the goods were good before he used them. That is about all. I had no conversation with Ament then; a little later. He was the discharged foreman. I looked him up, and he was discharged. I thought, perhaps, he could give me some information, which he did. I had this interview subsequent to the interview with Kiefer at a saloon in the neighborhood. His name is Ament. That is the man (pointing to a gentleman in the court-room). I couldn't give you the correct date. It must have been the latter part of July or the first part of August.

Q. Did Mr. Ament at that time state to you that his beer was soured?

(Same objection; objection sustained; to which ruling counsel for defendants duly excepted.

A. Mr. Ament had a conversation with me at this time about the damaged beer in Mr. Kiefer's cellar. He stated to me also what had damaged the beer.

Q. Did Mr. Ament at that time and place say to you that Mr. Kiefer's ice machine was broken down at that time—that is, at about the time of the spoiling of the beer—and that his beer cellars went up to about 15° Reaumur, and that the beer was soured on that account?

A. Before that time he said his machine broke down, and that that was the reason of his beer souring, and that was the reason the temperature went up to 14 degrees Reaumur; 14 degrees he said; not 15.

The WITNESS: In the same conversation; he said before that time it had broken down.

Q. Did Mr. Ament at any time and place other than this
144 inform you that the damage to Mr. Kiefer's beer was caused by the breaking of his ice machine and the rising of the temperature of his beer cellars?

A. Yes, sir; at Syracuse.

(Counsel for plaintiff objected; objection overruled; excepted.)

I had a conversation with him at Syracuse. He said then that Kiefer's beer had been spoiled by breaking of the ice machine and temperature of the cellar. He stated that and said he wouldn't sign any papers. I served him with a paper to come to New York; I presented him with a written paper requesting him to sign; I think I have the paper at home; he didn't sign it; he said he "wouldn't sign no paper." I never had a conversation with him in the city of New York, where I requested him to sign a paper. I saw him in office of O. O. Bennett, at No. 1 Front street, once, but not with Mr. Bennett, right after he came down from Syracuse. I wanted him to sign a paper of what he had said in Brooklyn to me, but he said, "I won't sign any paper." I never offered him money as a consideration of his signing a paper, nor did I offer *him* to give him a position if he signed a paper; he asked me to get him a position. He said in his conversation in the saloon in Brooklyn that the beer was not damaged by Gaff, Gent & Thomas' goods.

Mr. Tracy moved to strike that out.

The WITNESS: I can't swear to it, but I think this conversation was in the early part of August.

(Plaintiff's counsel objected; objection overruled; plaintiff excepts.)

I asked him if it had been damaged by Gaff, Gent & Thomas' goods; he said it had not. I went to Mr. Ament's house myself; I did not request him to come to the office of Mr. O. O. Bennett. Mr.

Frank Newman was present in Brooklyn at the conversation that took place in the saloon there; he heard the conversation, as
145 he sat at the table near us, and we talked loud enough that he could hear the conversation. He took no part in it. I asked him to listen to what he had to say. I am not now in the employment of the defendants, Gaff, Gent & Thomas.

On cross-examination by counsel for plaintiff he testified:

I saw the foreman the second time I went there—first time at his house, first at the brewery, and then at his house. I saw his wife; I asked her whether he was at home; she said he wasn't at home; he wasn't there then. That was the first time I went there. I did not see him on that occasion; I went over again, perhaps, two or three days afterwards; it might have been four days; it was within a week; I don't exactly remember where I called to see him that time; I swear positively that I did not go to the house. I did not inquire of his wife the second time where he was. The second time I met him I forget where it was; it was in Brooklyn; we went to a saloon together, though it might have been the brewery where I met him, or it might have been the house; it wasn't at his house; it might have been the brewery; I cannot swear it was the brewery; it was somewhere near the saloon, at Ochs & Lehund's saloon; I don't know the name of the street; he keeps a brewery there; I was looking for Ament; I didn't know him. The second time I inquired in Ochs & Lehund's saloon for him; I think Mr. Ochs went out for him, to his house for him: I am not positive of that; I couldn't swear that he was sent for; if he was sent for I don't know who went for him; I only know I met him and we went into that saloon; I don't know who introduced him. Mr. Newman was present; he went over with me there; he didn't have anything to do that day, and I asked him to go along; he went at my request; we did not separate from the time we left New York until we left Ament; we continued together all the time until we struck New York. I told him what Ament said in the saloon. I told Mr. Ament that I heard he had trouble with his beer. I met him around
146 there somewhere and was introduced to him; I don't know by whom. I don't know what kind of a man introduced me. I couldn't say just where it was; somewhere in the neighborhood. We must have struck him around there somewhere. They knew around there that I was looking for him. I asked Mr. Ochs, but I couldn't say whether he knew me or not; I suppose I didn't want to go to his house the second time. I was with him at the house the third time I was over there; perhaps I didn't go the second time I was over, because I had a friend with me and it was in the evening—late in the afternoon—in the evening; it wasn't dark yet, but it got dark while we were there. On being introduced to him I felt I was only there to make his acquaintance, and I asked him to sit down, and I asked him several questions as to why he got into trouble with his beer, and so on, and he answered me. We drank one or two ponies of beer, which is a half glass. I don't

know who paid for it. I suppose I paid for one and he the other. I know I paid for some; I called for it once. I suppose he did the second time. I suppose we had more than one. Mr. Newman drank with us, and perhaps Mr. Ochs took a glass with us; no one else that I remember. I don't remember whether we had been drinking or not before we went in. I suppose we stayed in there about two hours. We were not in the saloon all the time. I had no paper with me there. I did not ask him to sign any paper, nor did I say anything about a paper there. He didn't refuse to sign any paper. No paper had been prepared at this time. I don't know whether he left before us or not. I don't remember who else was in the saloon during those two hours. I was in and out of the saloon. I suppose we would sit there half an hour or so talking this matter over; then we went in and out of the saloon. I don't remember where else we went. I don't remember what we went out for, but I remember going out. No; I might have been in his brewery. We re-
147 turned to the saloon because we felt like it, I supppse. I am not sure, but I suppose we met Mr. Ament and went in again. Yes, sir; that is all I can say, but I swear I met him in that neighborhood. The first thing I said to Ament was that I was very glad to make his acquaintance, and he was glad to meet me, I suppose, because I am a fellow-brewer that was always good natured. He knew my name well enough. I don't know how he knew it. He seemed very familiar in every way. I told him who I was. I told him I was with Gaff, Gent & Thomas. I don't remember everything that I told him. I told him I come over to find out what was the trouble. I heard Kiefer discharged him, and I told him I thought he could give me some information, which he did. I did not tell him that I had been sent over. I had not been sent over that night; I had before. I had not been charged with the duty of seeing this man, hunting him up, and having an interview with him. I was sent over to find out what the trouble was. They sent me to Syracuse to find him, but not to Bro oklyn. When I told him I came to find out what I could about the beer he didn't say much; he sat down there. We sat down, and I asked him the following questions: I asked him if he could give me any information as to how his beer was spoiled, and he said he could. Then I asked him how his beer got spoiled, and he told me how it got spoiled, and that was about all I wanted to find out. We had a long conversation there yet. I asked him how his temperature went, and he said 14 degrees Reaumur. When I asked him how many times he had trouble with his ice machine *and* he said two or three times. Then he told me he couldn't get ice to cool his temperature down. He told me his temperature stood that way nearly a week; he couldn't get ice enough. He told me the ice machine was no good. That is about all I remember. I didn't have time to think of it long. I only got my notice yesterday to come over here. I made a memorandum of the conversation the next day, but I mislaid it, and I think I have lost it. I can-
148 not swear that I have lost it, but I have mislaid it and can't find it. I saw it last about a year ago; I don't remember

where, but put it away with some papers in Gaff, Gent & Thomas' office, where I had it, and that is the last I remember of seeing it. I went to Brooklyn some time after that. I cannot swear that I have told you all the conversation, but all that I can remember I have. He made a suggestion to me about getting him a position. He asked me if I heard of a place to let him know. At the saloon that night I told him if in my travels I heard of a place I would let him know. I told him I was traveling; I don't remember at what stage of the conversation it was. I was not traveling at the time I was in Brooklyn; I had come back from Baltimore before that. In my business with Gaff, Gent & Thomas I was traveling selling their goods, and then I sold goods in New York. I didn't travel all the time. I sold goods in Brooklyn for Gaff, Gent & Thomas. I showed them how to brew, also. I did not travel all the time; only at certain times. I traveled for them at and after this time, as I had entered their service about a month before that, in the beginning of July; I cannot fix the date positively, but the books will show I had just come back from Baltimore before I went to Brooklyn selling their goods. I had been somewhere before that, though. I next saw Ament the third time I went over there. I don't know exactly where I met him then, but he and I went to his house together; I don't remember where from, and I don't remember how far from his house I met him. I called at his house the first time I went there. I swear that I went there the first time and this time. No, sir; I did not go there three times and find him absent three times. I went there twice, the first time alone and the second time with him. Those are the only times I was there. I don't remember that I told his wife that I wanted to see him, and for him to come to New York. I won't swear to this. I said I didn't remember telling
149 this to his wife. I don't remember on the 3d of August I told his wife this, but must have inquired for him, as I was looking for him.

By the COURT:

Q. He asked you over the third time—the third day?

A. I couldn't remember. I was there with Mr. Ament the third time.

By counsel for plaintiff:

Q. What occurred with Mr. Ament at his house?

A. I suppose we talked the case over; I don't remember. He went away and I only saw him a minute the third time I was there. At his house he left and went one way and I went the other. I went into his house. We went upstairs together. Yes, sir; I saw his wife. I might have said good day. I don't remember anything else. We went upstairs together, he and I, and not his wife. It was in his room that I saw his wife. I don't remember what I did when I got in his room. I think I asked him one or two questions, but I don't really remember what it was. I don't think I could have gone with him unless he asked me to accompany him. Still, I don't remember. I don't know whether he asked me to go to his room or

not. I don't remember what I said after I got there, nor how long I stayed there. Nothing occurred that I remember while I was there. I don't know how I got away. I don't remember whether anything was said about the suit pending. I don't think I knew anything about the suit then, because I was new in the firm. They only sent me over there to see about the beer. I don't think I knew about the suit then. I think at Syracuse was the next time I saw Ament; I forget what time it was; in the winter some time. I know I got an awful cold. I went up to Rochester, and it was on my way to Rochester and Buffalo. I took a paper with me then. Well, I prepared one paper, and I suppose it wasn't quite right, and Mr. Phœbus helped me to prepare the second one. He wrote it. (Reiterated.) We wrote it together in our office and I took it along to Syracuse, and at the
150 same time I took a subpœna for him, and to save him the trouble of coming down I wanted him to sign a paper. I told him this. I don't remember whether the lawyer told me to tell him this. I told him if he didn't sign the paper he would have to give testimony. I wanted to get his testimony, that is all, as to what he said. I wanted him to sign that paper. I read it to him. He said he wouldn't sign any paper. He would rather come to New York. He said he wouldn't write his name to any paper. After I read it to him he didn't tell me it wasn't true as the reason he wouldn't sign it. The subpœna was in this case and I served it on him. I was instructed to serve the subpœna. I had instructions that if he signed the paper not to serve the subpœna. Mr. Bennett gave me the address, I think. It was not the lawyers. I received the subpœna, I think, from Mr. Bennett. Yes, I gave him the subpœna. I didn't serve it as soon as I saw him. No; I never had a conversation with him in Mr. Bennett's office, never here, about his being witness, nor to sign a paper there. I never had any conversation there on the subject.

FRANK NEWMAN, being duly sworn and examined as witness for the defendants, testifies:

I am a clerk employed by David Meyer, brewer. I know Gaff, Gent & Thomas. I couldn't say exactly I know Conrad Ament personally; never met him before or since, only at the time he was with Mr. Schalk at Mr. Ochs' saloon. I was present at the conversation between Schalk and Ament in Ochs & Lehund's saloon. That is the gentleman (pointing to a gentleman in the court-room). I am positive of it. I was present at the conversation. It occurred towards evening—latter part of the afternoon. I couldn't say positively about the date. It was the latter part of July or the first of August. I heard Mr. Ament tell Mr. Schalk upon that occasion that the injury which had previously occurred to Mr. Kiefer's beer was caused by the breaking of his ice machine and the raising of
151 the temperature in his beer cellars beyond a proper degree. He said the beer cellars had gone up to 14 degrees and had remained so for about a week. He stated exactly that Mr. Kiefer's beer was not injured by Gaff, Gent & Thomas' goods. He was very angry at the time about Mr. Kiefer. He said he had been repeat-

edly asking him for ice and he couldn't get it, and he said it was not the goods of Gaff, Gent & Thomas, but it was caused by the temperature rising in the cellars—in the beer cellars. I was present with Mr. Schalk at Ochs & Lehund's saloon. We were all sitting at the same table together. I was not requested to go over there with Mr. Schalk on the account of Mr. Kiefer. I was only requested as a friend to go with him. Mr. Schalk did not request me to pay special attention. I was only there as a friend. Certainly I paid attention to what was going on. I did this as a matter of fact. I was sitting at the table and drinking an occasional glass of beer with them.

Q. Will you state the whole conversation that occurred at that time about this beer?

(Objected to; objection sustained; defendants excepted; noted)

Cross-examined by plaintiff's counsel:

Mr. Schalk didn't ask me to pay special attention; I listened from my own curiosity. He did not ask me to pay special attention. (Reiterated.) I was not curious on account of this suit; I only wanted to find out something about Kiefer's business. I did not know that Mr. Kiefer had a suit then. I was curious about the suit, because I know something about those goods—the beer being warm and the temperature rises in the cellars and the beer naturally spoils—but I didn't know there was any suit about that. I was listening from curiosity. I won't answer what I was curious about; I have answered that already. Well, I was idle at the time, and Mr. Schalk said he was going to Brooklyn on some business and asked
152 me if I had anything to do, and whether I had any objection to going over there, and I said, "No." I was never asked before what this man said with reference to this case. No, I had never seen Ament before. I knew he was Ament because I was introduced to him as the previous foreman of Mr. Kiefer. Mr. Schalk introduced me in Ochs & Lehund's brewery—that is, in his saloon connected with the brewery. Mr. Ament came into the saloon and he spoke to Mr. Schalk and I was introduced to him. Certainly, Schalk spoke to him. Then Schalk introduced me to Ament. Schalk knew him, as far as I could see him. They appeared to know each other, as far as I could see. Mr. Ochs was present at the introduction. I couldn't say exactly how long we stayed in the saloon. We were talking about different things, We were sitting at the table drinking and he was talking to Schalk about this Kiefer matter. I heard them say after they had been talking about this matter of a position there—I heard him say in case he heard of any position in his travels he should let Mr. Ament know about it. He said in case he should hear anything he would let him know.

RICHARD THOMAS, recalled and further examined by counsel for defendants, testified:

From what quality of corn was the cerealine manufactured in December, 1882, January, February, March, April, May, and July, 1883, taken?

A. It was all taken from the crop of 1882. The same crop of corn was used in the manufacture of cerealine from December to April that was used from April to July. My partner lives in Columbus, Indiana, and has never been a resident of New York nor been in the management of the business here. He was here temporarily on business connected with our firm in July, 1883.

On cross-examination by plaintiff's counsel he testified:

All our cerealine was manufactured from corn crop of 1882, and we manufactured from December. We begin to buy our corn as early as first of November, that year's crop, and the manufacture of it. I know most undoubtedly that corn in November, December, and January of that year's crop is more likely to heat than where corn has been through the summer, and corn in November isn't as fit for use as it is in May and June and July. There is too much moisture in it. The moisture is nearly all taken out by March. I don't know anything about August corn selling for more in Chicago every year because of the benefit of summer's heat upon it;
153 no, sir. I don't know this fact. The moisture in corn, the water that is in the corn, is dried out, and it is dried out generally by March entirely. You cannot get any more out of it. I say that by June, after that time I don't know of any shrinkage. The fact of whether the water is dried out of the corn by March depends upon its condition when it is cribbed and the temperature of the winter through which it has passed. This may have an influence on it. The wind and freezing cold weather certainly has the effect to dry the corn. I do not know whether corn cribbed green will be injured by excessive frost even after it is cribbed. It is customary to crib corn green. I mean to say that a frost on hard corn won't hurt it. It might hurt wet corn, but it might dry out again. We know by the grinding what crop corn comes from; by the use of it always. We know by looking at it and we know by our bills the difference in 1882 corn and 1881 corn. The 1881 corn gets harder as it gets older, gets dryer, and you could perhaps tell at March if it is the same crop. The previous year's crop would be better than last year's crop, because it might not be all dried out.

By a JUROR:

Q. Is all of this corn that you buy sent from the same section of the country?

A. Not all; not all from the same section; no sir; pretty much of what we bought, that come in there from the cars, was all out in Illinois, the great bulk of it.

Counsel for defendants offered a certain portion of proof of loss of the fire in October.

Objected to as immaterial.

Proof of loss admitted in evidence, subject to exception, marked Defendants' Exhibit No. 8.

COUNSEL FOR DEFENDANTS: I have the proofs of loss here of the

fire in October. I now offer them in evidence. I offer only a certain portion of it.

(Objected to as immaterial.)

(The paper is admitted in evidence, subject to exception, and marked Defendants' Exhibit No. 8.)

WILLIAM J. HUDSON, recalled and further examined by counsel for defendants, testified:

By Mr. PHŒBUS: I remember some cerealine that was sifted
154 at No. 43 Water street about the month of June, 1883. I was present at the time of the sifting and saw the goods taken from the bags. It was all put in new bags without a mark. Nothing that was injured was put back in sacks or bags.

By counsel for plaintiff:

—. That was at 43 Water street?

A. Yes, sir; I was there a great part of the time when cerealine was being sifted. I was interested in both stores. I was present the greater part of the time. I and the other men sifted it. I sometimes worked personally—that is, sifted. Other men who worked in the store sifted the goods, and one of the men is here now, John Abraham. There is no cashier here, but there is another gentleman that worked in the store, but not at that time. I don't think he worked in 43. The goods were sifted in April, May, and part of June. I had charge of "37" and "43" also. I gave my personal attention to both of those stores. I was back and forth. I am directly interested as a warehouse keeper in these cerealine goods. Mr. Green and I were mixed in business some way.

Counsel for defendants offers the entry in these goods for beer returned for the months of September, October, and November, 1883, and January, 1884.

155 The following testimony was offered by the plaintiff in rebuttal:

CARL A. HOLSTEIN, being duly sworn, and examined by counsel for the plaintiff, testified:

I am a manufacturer and a chemist. I am working practically at chemistry for 14 years. As far as I know, if corn or any other grain should be frost-bitten it ferments before all the flour and starch gets into sugar, and by leaving the corn lay in a short length of time it will go and heat up, you know, and after the heat it forms acetic acid, whether it is in solution or in bulk. If it is kept together in a bulk in a large quantity it will heat up faster and after it goes over and gets in fermentation. Meal into which more or less frost-bitten corn had entered would be more liable to heat than meal into which only sound corn had entered. Lager beer with meal in it that has become heated couldn't be sold very quick after it is manufactured. I suppose, as far as I know in the chemistry, it would go right over to acid. What we call sour beer is nothing but the formation of acid, and we call that acetic acid, and the longer the beer

was kept the sourer it would get. If it were sold while tolerably fresh it might pass without detection; if it were kept a long time you could't make drinkable beer out of it; it would be sour. It is impossible for sour beer in tanks in the cellar with other beer in tanks to sour the other beer.

On cross-examination by counsel for defendants he testified:

They never have any other but air-tight tanks in a stock room, but if there were any that were not air-tight then it would sour it sure. Heat undoubted- will occur in all products like cerealine, say corn or any grain of that kind in the grain state, not thoroughly ripe, and it should lay. It is not the heat that I have spoken of that ferments or injures the grain, common to the product of all grains of all description. It is not uncommon to find that all products of cereals will be heated more or less where they are expresed in the way that grain and such prod-
156 ucts are expressed. If kept in a proper way corn is no worse than any other product about heating. I don't know much about it from analysis, only what I have heard here. Now, if this same material, the substance of it, should be taken from corn what is not ripe it will be the same as taking an unripe apple. The unripe apple tastes sour at first, but you take it off the tree and leave on straw, or anywhere, you find it gets sweet. Here it is a different process. Here in this very case the corn, before it gets into starch or flour, goes over into something that we don't know in chemistry what it is. We call it dextrine. From dextrine it goes over into sugar, and this sugar will finally go and turn into acetic acid. I have never experimented with cerealine. If cerealine is kept dry it will keep for a long time, but otherwise I say it will not. It will go into sugar the moment after it goes over into yeast and ferments, the same as anything else—that is, as far as my knowledge goes about this matter. If you wet this stuff now you can use it for brewing right afterwards, but if you keep it a month you can't brew with it. I can't say the shortest time it would ferment after moisture, without experimenting with it. I know nothing about it myself. About harvested corn now—what I am speaking of is any corn, any corn that is "in," say, in the fall after it is ripe. The longer it lays the better—say up to early in the next spring—it will keep and yield its quantity of starch and what other properties it has, but after that I think it loses during the next year, loses some of its properties—first starch. This grain I have here is yellow corn; it don't make any difference; but if you keep that corn in that state you can keep it in a dry room years; if it is ground up you can't keep it, and if that should be got in before it is thoroughly ripe I don't say that it would keep more than six months; it will go over and be spoiled. I couldn't tell you what of its properties corn loses after being kept on the ear or shelled, without experiment-
157 ing. It would lose somewhat in weight; it would separate the starch some.

(A juror here asked the witness if that corn gets thoroughly ripe in October and is ground immediately if it will heat.)

WITNESS: It would not if it was kept properly aired; then the meal wouldn't heat.

No chemist can tell by looking at a glass of lager beer, or a barrel of beer, or the yeast that it is made of, or the mash that it is made of, what spoils it.

Counsel for the plaintiff asked the witness if meal ground from new corn isn't more liable to heat than from old corn?

A. It is more liable; the older the corn the less liable the meal is to heat.

On further cross-examination witness continued:

The material that is made from the corn is first hulled by machinery, next it is put through a kiln-drying machine and dried as thoroughly as they can dry it, and then made into hominy. Now, if there were any imperfections in the corn at all these processes would not eliminate it. If corn is pure and kept in a nice airy place it will keep—as far as I can see it may keep for years, for all I know. If made from a little immature corn it would be more likely to take up moisture, but this would require exposure.

JOHN ABRAHAM, recalled and examined by the plaintiff's counsel, testified:

Q. Mr. Green says that none of the meal that was sifted at 43 Water street was put into the same bags it was taken out of. Will you tell us how that was?

(Objected to as having already been answered; objection sustained.)

Q. Is it true that all of this meal that was sifted was put into new and different bags from that marked diamond "C?"

(Objected to; objection sustained.)

158 A. They used new bags—the worst stuff was put into the new bags. I couldn't tell what portion we sifted was put in new bags. I guess about half of it—I couldn't say exactly how much—and the balance was put into the old bags that it came out of. This was sent out. I don't know to whom.

(Witness, when asked if he had heard Green say anything about letting that go out, answered that he had heard—Mr. Phœbus objected—Green say it must all be inspected; that is all. That cerealine that was put into the old bags was to be reinspected. He, Green, had orders to have it reinspected, as it must be before it went out. If I swore that all the goods were put back into diamond "C" ◇C◇ bags I made a mistake, as I didn't intend to say so.)

AUGUSTUS LUNDIN, being duly sworn, and examined by counsel for plaintiff, testified:

I have worked for Mr. Green, and in 1883 I worked for him. I came to him the 13th of April and stayed ten months. While I was working there I saw cerealine sifted and was working at it. I worked very few days at 37 Water street. I sifted some myself. Some of

this was put in new sacks and some put back in old bags—diamond "C" Ⓒ. I don't know the names of parties who bought. Nothing else but brewers' wagons removed it. Cerealine was what these brewers' wagons took—good and bad. Most of the cerealine was sifted at 43 Water street—about a couple of thousand bags. About two-thirds was good and the other third sifted. I was the record man in the store and Abrahams was the porter, and he had to keep the account. The other man was the porter, and I had just come there a few weeks only. I used to work. I didn't keep account of it. The other portion was put into the bags out of which it was taken. I did scrape the inside of the bags. We shook them. This cerealine looked bad. If you see any big lumps when you dump the bag, we pick out the lumps from what ain't bad, and it looks yellow and green. We break the lumps and throw it out and sift it. We dump the bag and there comes out some lumps. We put, as I said, the best stuff in the old bags and the worst in the new bags. These lumps we picked out. We dumped this on the floor; then we tried to take the best part of it and keep it separate, and the worst we break the lumps and put it through the sieves. We
159 kept the best part separate from the other. We bagged it up in old bags and that that went through the sieves in new bags. We put the best in old bags, diamond C, until they run out—they never gave out, because other times they came in diamond C—and when they found out it was bad they had to empty it out. I don't recollect whose brewery wagons I saw there; not a single wagon. Brewers' wagons have sides on them to hold the kegs; no other people's trucks. The trucks that got these goods were brewers' trucks.

(When asked if all were brewers' trucks witness didn't answer.)

Witness continues: Just brewers' trucks. I don't know whether any of these brewery wagons got these goods for feed or to use to manufacture beer of.

CARL A. HOLSTEIN, recalled by counsel on the part of the plaintiff, testified:

Q. I will ask you this question: Where meal in a bag has become so heated from any cause that lumps have formed in the bag, so that part of it is lumpy and part of it is not, whether the part not lumpy would become affected by the heat — as to be unfit for use.

A. By my knowledge I should think that if that bag gets warm once that is enough to spoil it, as far as I have seen it.

CONRAD AMENT, recalled by counsel on the part of the plaintiff, testified:

I heard the testimony of Mr. Schalk and his companion.

Counsel asked witness if he ever had any conversation with those two men in Ochs & Lehund's saloon?

(Counsel for defendants objected; objection overruled; excepted.)

Witness goes on: I had had no such conversation. I first saw Schalk at my house. He came in the door. My wife opened the door for him. He then asked for me and went into the front room and then asked for me. He asked my wife if I was at home. My wife said, "Yes, sir." I was in at the next room, and my wife called me out. I did not know him at the time. He introduced himself to me as Schalk, and he said this in the presence of my wife.

160 EDWARD M. LICHT, recalled on the part of the plaintiff, testified:

I guess I was at 43 Water in April, May, June of 1883, two or three times in all, and I saw them sifting cerealine there.

Q. Describe the manner they sifted it.

(Objected to by defendants' counsel; objection overruled; to which ruling counsel for defendants duly excepted.)

The court asked Mr. Licht if he saw it sifted, and he said he did. I saw they had it in diamond C bags—the same bags. On these occasions of my visits I suppose I saw from ten to fifteen bags while I was there. I had a truck loading there and was only there a short time. This truck I was sending to a customer.

On cross-examination by defendants' counsel he testified:

I was there (23 Water street) the first part of June and the latter part of June. The 26th was the last I was there—26th of June, 1883. I don't know positively whether I was there in May or not. I judge these dates from my books; I couldn't do so without my books. I remember I went there to get a load of goods. I could tell it was in June; I couldn't tell the exact date. I know it was June because it was about the time father went off to Indiana—about the time this difficulty occurred. I had a carman that I got from Broad street. I don't know his name. It was an ordinary truckman. They were loading it with cerealine. I don't know whether I named the same brewers my father gave. Yes, I know who I named—Trafts and Krieger, of Newark; another party named George W. Wedemeyer. He sent back somewhere around 15 bags. The man in Elizabeth sent back 50 bags, and the Newark men one time 80 and another time 50. I have a list of all of them in my books. I made a memorandum from my books. If you should look at it (addressing defendants' counsel) you couldn't understand it. Yes, I copied the papers from my book. I didn't copy it for the purposes of this case. I heard the testimony here the other day and went home and copied it. I couldn't remember the exact amounts without copying it. (Witness here hands paper to counsel.) I believe that on this paper is a list of all the goods returned to us. I keep the books for my father; they (these books) are his and mine in partnership. As to this list including all, I can only say that I didn't have time. This list does not show all of the goods returned to Gaff, Gent & Thomas. It only shows the ones we billed direct ourselves.

161 There were also a lot sent back from Philadelphia, and

this is a memorandum that went through our own books as purchasers. It is complete as far as I could get it. I think this memorandum contains all the complaints of goods or memorandum of goods that were sent back. That my father and I bought and put on our books and rebilled them new, and it is made as honestly as I can make it.

Witness then reads:

George W. Wedemeyer, three bags; they got there. There is one I have got here where it was returned—yes, I have it—Joseph Hansler, Newark, N. J.; that was the 50-bag lot. C. Trafts, Newark, 80-bag lot; 80 bags came back. Krieger, Newark, N. J., 40-bag lot, 45-bag lot, and 45 at another; it all came back. Then Liebel & Bright, 50 bags; he is in Elizabeth, N. J. I have now read it all through. We returned those goods to O. O. Bennett. I don't know what he did with them. I don't know where I landed them. The brewer shipped them back, but I gave them orders to ship them back to O. O. Bennett, and scratched out the bills. I excluded them from our bills. I also heard complaints from Bergner & Engle Brewing Company, Philadelphia. They called on Bennett and we heard the complaints—from O. O. Bennett. My father sold these goods on commission. We get monthly statements for our commission. We heard they sent back goods, and we got our commission on those goods, but Bennett dealt directly with them. Then we heard complaints from all over the city. I don't know exactly the parties' names; I couldn't name one; I couldn't tell you without my books. The goods that were sold and billed by Bennett went on our books, because we get an account of it from O. O. Bennett. We kept a memorandum entry of the sales so we would know at the end of the month what were our commissions. I can't remember the names, except of this Philadelphia house, other than I have given, without looking in my books, and I haven't had time to do that.

On redirect examination by counsel for plaintiff he testified:

I do not know from our settlement with Bennett how many people father and I sold these goods to that sent them back.

162 On recross-examination by counsel for defendants he testified:

I have no personal knowledge without looking at my books. I didn't see and handle the meal when it was returned, except those goods I sent and billed. Then there is a lot I can show you that I inspected that went there. I had the inspector inspect it, and after it went there it was hot and the brewer was going to kick me out. He said I didn't have it inspected. This was C. Trafts, of Newark, N. J. I have spoken of him before. I promised to have them inspected, and when I got there they were hot and he was abusive to me.

On further redirect examination by counsel for plaintiff he testified:

That lot had been inspected by an inspector—the man that was in court. I saw it inspected. I was at pier 4 when it was inspected. I saw Fitzpatrick inspect these 80 bags on the 2d day of June, 1883. These same 80 bags were sent out to this brewer. I saw them sent the same day, and I went over to see the brewer the next week. He was abusive to me. I told him I had them inspected, and he didn't believe it. I told him I would prove it to him. I explained to him how it was, and then it was all right, no more than we took a drink together. These goods were sent back to Bennett. I told the brewer to do this and notified Bennett. That is all I know about it. This was in the fore part of June, and the goods came back about a week later. It was about a week and a half after that that I gave the order.

On further recross-examination by counsel for defendants he testified:

I have never been informed that Bergner & Engel sent those goods back because they didn't want to use that kind of goods, nor have we ever received any intimation of that fact. They were damaged goods. I didn't see the goods.

163 Mrs. LIZZIE AMENT, being duly sworn on the part of the plaintiff and examined by counsel, testified:

I am the wife of Conrad Ament. I have seen Mr. Schalk once before at my house. He called there three times. Twice he called, and the third time my husband was in. I do not know how long apart these visits were. The first time he asked for my husband and introduced himself as Mr. Schalk; my husband wasn't there; and the second time he asked for my husband. The third time he called my husband was in, in the other room, dressing. I told Mr. Schalk my husband was home, and he said he wanted to see him. I told him he was in the other room. He introduced himself to my husband as Mr. Schalk, and they went away together. I saw Mr. Schalk after that in Syracuse; he wanted to see my husband there. My husband was not in the first time there, either. He called again to see him, and the first thing he did was to give him a paper; he gave him no money with it. He gave him the paper to come down here, and after he gave my husband the paper they went out.

On cross-examination by counsel for defendants she testified:

Did Mr. Schalk ask your husband to sign that paper at the house?

A. That I don't know.

The foregoing is all the evidence offered on the trial of the case; whereupon the counsel for both sides summed up.

The court then charged the jury as follows:

"GENTLEMEN OF THE JURY: I shall detain you but a very few moments in this case, because the controversy arises out of a ques-

tion of fact, and on all questions of fact you are to be the judges, and not the court. What those questions of fact are you understand from the argument of counsel on both sides. You also have observed the only difference between counsel is upon a question of law. There are three features in this case to be attended to by you.

164 One is, Was this cerealine unfit for malting purposes—making beer. This is a question of fact. The cerealine that this plaintiff used, bought from this firm, as is conceded, Was that unfit to make beer with? Are you satisfied that the condition of the beer that was there brewed by the plaintiff is the result of using cerealine unfit for use in brewing beer? That is a question for you, and I express no opinion upon it. You must decide that. It is not necessary to produce a chemical analysis to satisfy you, but in order to find a verdict for the plaintiff you must be satisfied from the evidence that this bad condition of the beer, which the plaintiff complains of, arose from the unfit condition of the cerealine which he bought from defendants.

"The next question is as to the knowledge on the part of the defendants necessary to maintain this action. This action is not an action upon a contract, but an action for fraud, and in order to justify a verdict for the plaintiff you must find that there was fraud practiced upon this plaintiff by these defendants—fraud in the selling, in the character of the cerealine sold the plaintiff by Bennett, the agent of the defendants, employed by them to sell cerealine in New York. If Bennett knew that the cerealine which he sold to the plaintiff was unfit for use and unsound and concealed the fact from the plaintiff his knowledge is the knowledge of the defendants. You may find the defendants guilty of fraud by reason of fraud committed by Bennett in selling the cerealine, as charged, if he committed the fraud.

"The only other question is the question of damages. If you find this fraud to have been committed and thereby done injury to this man's beer, then the question arises how much he was damaged. That is a question of calculation of the number of barrels of beer that were lost in this way. He is entitled to recover in this action, if he is entitled to recover anything, the value of every barrel of beer that was made unfit for use by reason of unsound cerealine bought of the defendants having been used in the malting thereof."

165 Counsel for defendants then asked the court if he might have this special charge:

"That whether or not the cerealine was good or bad, unless the defendants or their agent, Mr. Bennett, knew at the time of the sale that it was bad, unless the jury are convinced of that fact, they have not made out a case of fraud and therefore cannot recover."

The COURT: I have so charged, and I now state it again. If neither the agents nor the defendants knew of the unfit condition of the cerealine, then the plaintiff cannot recover.

Counsel for defendants excepted to that part of the charge wherein the court charged that the defendants are liable for the fraudulent

representations of the defendants' agent without their personal knowledge.

The jury thereupon rendered a verdict in favor of the plaintiff in the sum of $8,522 in damages.

The counsel for defendants then moved to set aside the verdict on the ground that Thomas Gaff, one of the defendants, had died since the action was commenced and before the verdict was rendered.

The court denied the motion and ordered that the death of
166 said Thomas Gaff, one of the defendants, be declared and suggested on the record.

To which ruling the counsel for defendants then and there duly excepted.

The defendants' counsel then moved to set aside the verdict and for a new trial on the pleadings and minutes of trial.

The court reserved the question for argument.

The motion for a new trial came on for hearing on the 28th day of December, 1885, when the questions were argued; and thereupon the counsel for the defendants requested the court to grant the motion on the following grounds:

I. That the verdict rendered herein is contrary to the evidence.

II. That the said verdict is against the weight of evidence.

III. That the said verdict is contrary to law.

IV. That the court committed manifest error in refusing to admit evidence offered by the defendants that should have been admitted; to which the counsel for defendants duly excepted at the time.

V. That the court committed manifest error in admitting
167 evidence offered against the defendants; to which the defendants duly objected and excepted at the time.

VI. That the court committed manifest error in refusing to dismiss the plaintiff's complaint at the close of the plaintiff's testimony; to which defendants duly excepted at the time.

VII. That the court committed manifest error in charging the jury on the pleadings in the case that the defendants were liable for the fraud of their agent committed without their knowledge or consent; to which defendants duly excepted at the time.

VIII. That the court erred in charging the jury as to the rule of damages governing this action, and for other manifest errors in said proceedings.

Each and all of which requests the court overruled and denied, and an order was thereupon entered denying the defendants' motion for a new trial upon each and every ground taken; and it was further ordered that the plaintiff be permitted to enter judgment and proceed thereupon according to law and practices of the court against the surviving codefendants in this action; to all of which the defendants then and there duly excepted and prayed an appeal in open court to the Supreme Court of the United States, which was allowed.

168 The court thereupon granted the defendants thirty days from the entry of the judgment to prepare this their bill of exceptions.

Thereupon the plaintiff caused judgment to be entered, as will appear from the judgment-roll in this action.

And thereupon, upon the defendants' application, a writ of error was duly issued, under seal, which is as follows:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Henry Kiefer, plaintiff, and Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, defendants, a manifest error hath happened, to the great damage of the said Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, as is said and as appears by their complaint, we, being willing that such errer, if any hath been, should be duly corrected and full and speedy justice done to
169 the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[L. S.] B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

Allowed:
CHAS. L. BENEDICT,
U. S. Judge.

170 And thereupon the defendants duly filed and served upon the plaintiff's attorney a notice of appeal, of which the following is a copy:

United States Circuit Court for the Eastern District of New York, in the Second Circuit.

RACHEL S. GAFF, JOSEPH GENT, and RICHARD THOMAS, Plaintiffs in Error,
ag'st
HENRY KIEFER, Defendant in Error.

Please take notice that the above-named Rachel S. Gaff, Joseph Gent, and Richard Thomas hereby appeal from the final judgment entered in this action on the 26th day of February, 1886, in favor of the plaintiff (the defendant in error herein) against the defendants (the plaintiffs in error) for the sum of $8,522, and from every part thereof, and from the order denying a new trial, and from the order denying the motion to set aside the verdict on the ground of the death of Thomas Gaff, to the Supreme Court of the United
171 States to be held on the second Monday in October, 1886, at the city of Washington, District of Columbia.

Dated New York, March 1, 1886.

C. W. MOULTON,
Att'y for Plaintiffs in Error.

To M. L. Towns, Esq., att'y for defendant in error.

The service of a copy of which was duly admitted by the attorney for the defendant in error.

The foregoing "bill of exceptions" having been duly settled, I have hereunto set my hand and seal, and the same is hereby made a part of the record, as of the term aforesaid, this 22d day of March, A. D. 1886.

CHAS. L. BENEDICT, [L. S.]
U. S. Judge.

I hereby agree to the within as the proper bill of exceptions in this case.

Brooklyn, March 22nd, 1886.

M. L. TOWNS,
Att'y for Pl'ff.
C. W. MOULTON,
Att'y for Defendants.

(Endorsed:) Bill of exceptions. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 22d day of March, 1886.

172 United States Circuit Court for the Eastern District of New York, in the Second Circuit.

RACHEL S. GAFF, RICHARD THOMAS, and JOSEPH GENT, Plaintiffs in Error,
ag'st
HENRY KIEFER, Defendant in Error.

Please take notice that the above-named Rachel S. Gaff, Richard Thomas, and Joseph Gent hereby appeal from the final judgment

entered in this action on the 26th day of February, 1886, in favor of the plaintiff (the defendant in error herein) against the defendants (the plaintiffs in error) for the sum of $8,522, and from every part thereof, and from the order denying a new trial, and from the order denying the motion to set aside the verdict on the ground of the death of Thomas Gaff, to the Supreme Court of the United States to be held on the second Monday in October, 1886, at the city of Washington, District of Columbia.

173 Dated New York, March 1, 1886.

C. W. MOULTON,
Attorney for Rachel S. Gaff, Richard Thomas, and Joseph Gent, Plaintiffs in Error.

To M. L. Towns, Esq., att'y for defendant in error.

Due service of foregoing notice of appeal is hereby admitted. Brooklyn, March 1, 1886.

M. L. TOWNS,
Att'y for Henry Kiefer, Def't in Error.

(Endorsed:) Notice of appeal. Filed in the office of the clerk of the U. S. circuit court for the eastern district of New York this 26th day of February, 1886.

174 *Bond for Damages and Costs.*

U. S. Circuit Court, Eastern District of New York.

HENRY KIEFER, Plaintiff,
vs.
THOMAS GAFF, RACHEL S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Composing the Firm of Gaff, Gent & Thomas, Defendants.

Know all men by these presents that we, Maximillian Fleischman and Henry M. Anthony, both of the city of New York, are held and firmly bound unto the above-named Henry Kiefer in the sum of eleven thousand dollars, to be paid to the said Henry Kiefer; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the — day of February, in the year of our Lord one thousand eight hundred and eighty-six.

175 Whereas the above-named Rachel S. Gaff, Thomas Gaff, Joseph F. Gent, and Richard Thomas, composing the firm of Gaff, Gent & Thomas, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Thomas Gaff, Rachel Gaff, Joseph F. Gent, and Richard Thomas shall prosecute their said writ of error to effect and

answer all damages and costs if *he* shall fail to make *his* appeal good then, this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MAXIMILIAN FLEISCHMAN.
HENRY M. ANTHONY.

Sealed and delivered and taken and acknowledged this 25 day of February, 1886, before me—

B. LINCOLN BENEDICT,
U. S. Comm'r.

UNITED STATES OF AMERICA, *Eastern District of New York,* } *ss:*

Henry M. Anthony and Maximillian Fleischman, being duly sworn, each deposes and says and each for himself says that he is worth the sum of twenty-two thousand dollars over and above his just debts and liabilities.

176 MAXIMILIAN FLEISCHMAN.
HENRY M. ANTHONY.

Sworn to this 25 day of February, A. D. 1886, before me—

B. LINCOLN BENEDICT,
U. S. Comm'r.

Approved as to sufficiency Feb'y 26, 1886.

MIRABEAU L. TOWNS,
Pl'ff's Att'y.

(Endorsed:) Bond for damages and costs on appeal. Filed this 26th day of February, 1886.

177 UNITED STATES OF AMERICA, *Eastern District of New York,* } *ss:*

I, B. Lincoln Benedict, clerk of the circuit court of the United States of America for the eastern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 176, inclusive, contain a true and complete transcript of the record and proceedings had in this court in the case of Henry Kiefer against Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, defendants, as the same remain of record in said office.

In testimony whereof I have hereunto affixed the seal of the said court, at the city of Brooklyn, in the eastern district of New York, in the second circuit, this — day of September, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the said United States the one hundred and eleventh.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT, *Clerk.*

178 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of

the judgment of a plea which is in the said circuit court, before you or some of you, between Henry Kiefer, plaintiff, and Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, defendants, a manifest error hath happened, to the great damage of the said Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, as is said and as appears by their complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in, the city of Washington, together with this writ, so that you have the same at the said place, before the
179 justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of February, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, Eastern District of New York.]

B. LINCOLN BENEDICT,
Clerk of the Circuit Court of the United States of America for the Eastern District of New York, in the Second Circuit.

Allowed:

CHAS. L. BENEDICT,
U. S. Judge.

180 [Endorsed:] U. S. Supreme Court. Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, plaintiffs in error, *vs.* Henry Kiefer, defendant in error. Writ of error. C. W. Moulton, att'y for plaintiffs in error, 154 Nassau St., N. Y. city, N. Y.

181 UNITED STATES OF AMERICA, *ss:*

To Henry Kiefer:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the Capitol, in the city of Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein Rachel S. Gaff, Joseph F. Gent, and Richard Thomas are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 26th day of February, in

the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

CHAS. L. BENEDICT,
U. S. Judge.

182 [Endorsed:] U. S. Supreme Court. Rachel S. Gaff, Joseph F. Gent, and Richard Thomas, plaintiffs in error, *vs.* Henry Kiefer defendant in error. Citation. C. W. Moulton, att'y for plaintiffs in error, 154 Nassau St., N. Y. city. Due and timely service is hereby admitted. March 3, 1886. M. L. Towns, att'y for def't in error.

183 Supreme Court of the United States.

RACHEL S. GAFF, JOSEPH F. GENT, and RICHARD THOMAS, Plaintiffs in Error,
vs.
HENRY KIEFER, Defendant in Error. } 984.

And afterwards, to wit, on the thirty-first day of January, in the October term, in the year of our Lord one thousand eight hundred and eighty-six, the said Henry Kiefer, by Mirabeau L. Towns, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid, and he prays that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

MIRABEAU L. TOWNS,
Attorney for Defendant in Error.

184 [Endorsed:] Sup. Court U. S., 1886, Oct'r term. No. 337. Rachel S. Gaff *et al.*, pl'ffs in, error, *vs.* Henry Kiefer. Joinder in error. Filed Jan. 31, 1887. Due & timely service of a copy of the within joinder of issue is hereby admitted. January 29th, 1887. —— ——, att'y for plaintiffs in error. A copy of this paper has been received at this office on the 29 day of Jan'y, 1887. C. W. Moulton, attorney for plaintiffs in error, per Sherman Moulton.

[Stamped:] Office Supreme Court U. S. Filed Jan. 31, 1887. James H. McKenney, clerk.

Endorsed on cover: E. New York, C. C. U. S. No. 337. Rachel S. Gaff, Joseph F. Gent, & Richard Thomas, pl'ffs in error, *vs.* Henry Kiefer. Filed September 13, 1886.